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# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–72

UNITED STATES OF AMERICA, PETITIONER

*v.*

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (12585a–12615a) are reported at 426 F. 2d 32; the opinion denying rehearing and the order of the court denying rehearing *en banc* (12617a–12619a) are reported at 437 F. 2d 957. The opinion of the district court denying defendants' motions for judgments of acquittal notwithstanding the verdict, or for a new trial (6446a–6473a) is reported at 281 F. Supp. 837.[1]

[1] Pre-trial opinions in this case are reported at: 205 F. Supp. 94 (denial of defense motions to stay the prosecution pending completion of related Federal Trade Commission proceedings);

## JURISDICTION

The judgment of the court of appeals was entered on April 16, 1970 (12616a). On December 1, 1970, the court denied the government's timely petition for rehearing and rehearing *en banc*. On December 21, 1970, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including January 30, 1971. The petition was filed on January 29, 1971, and was granted on May 3, 1971 (402 U.S. 942; 12620a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in reversing criminal convictions by a jury in a major and complex antitrust conspiracy case because of alleged errors in the instructions, the court of appeals applied an improper standard of review by considering particular language in isolation rather than evaluating the charge in its entirety in the light of all the evidence and the defendants' arguments to the jury.

2. Whether the trial judge:

(a) unduly stressed an inflammatory issue when he told the jury that it may consider defendants' high

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217 F. Supp. 199 (denial of defense motions to strike allegations of unreasonably high profits and prices from the indictment and to dismiss the monopolization count); 245 F. Supp. 801 (granting motions of the individual defendants to dismiss the indictment as to them on the ground that they were immune from prosecution); 1967 Trade Cas. ¶72,170 (denial of defense motions to dismiss the indictment for prejudicial delay in impaneling the grand jury which returned it and for discovery of the Justice Department's internal memoranda which bore on the alleged delay).

profits and uniformly high prices along with other evidence bearing on the charge of conspiracy;

(b) should have charged that before the jury can convict it must find false the denials of illegal agreement by defendants' officials;

(c) properly (i) permitted both sides to argue to the jury the significance of the conduct of an unindicted firm in the industry while barring defendants from discussing that firm's presumption of innocence, and (ii) charged the jury that it may consider the conduct of the unindicted firm but is to draw no inferences from the fact that it was not indicted;

(d) in his charge unduly emphasized the patent aspects of the case, inaccurately described patent license arrangements among defendants and co-conspirators and improperly explained the significance of preconspiracy conduct by one of the defendants.

## STATUTE INVOLVED

Sections 1 and 2 of the Sherman Act (26 Stat. 209; as amended, 15 U.S.C. 1 and 2) provide in pertinent part:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one

year, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

## STATEMENT

In this criminal antitrust case, after a lengthy trial presided over by Judge Frankel of the United States District Court for the Southern District of New York, a jury convicted three corporations, Chas. Pfizer & Co., Inc. ("Pfizer"), American Cyanamid Company ("Cyanamid") and Bristol-Myers Company ("Bristol") under a three-count indictment charging the defendants with violating Sections 1 and 2 of the Sherman Act. The violations were: (1) conspiring to restrain, (2) conspiring to monopolize, and (3) monopolizing trade in a market which consisted of four clinically interchangeable broad-spectrum antibiotic drugs: tetracycline, chlortetracycline (Aueromycin), oxytetracycline (Terramycin) and chloramphenicol (Chloromycetin). Each defendant was fined the maximum of $50,000 on each count.

A divided panel of the Court of Appeals for the Second Circuit reversed and remanded for a new trial, primarily because of what the panel considered to be

errors in the instructions to the jury (12585a–12615a; 426 F. 2d 32). The full court initially granted the government's petition for a rehearing *en banc*, but vacated its order, 4–3, after the panel rendered a second opinion denying rehearing but materially modifying the reasons for its earlier ruling (12617a–12619a; 437 F. 2d 957).

## THE INDICTMENT

The indictment (24a–41a) was returned on August 17, 1961, naming as defendants Pfizer, Cyanamid and Bristol,[2] and as co-conspirators Olin Mathieson Chemical Corporation (which subsequently acquired and is referred to as "Squibb") and The Upjohn Company ("Upjohn"). It charged (32a–33a) that the defendants and co-conspirators engaged in a continuing "unlawful combination and conspiracy which began in or about November 1953" to restrain trade in the broad spectrum antibiotic market. It alleged that the terms of the "continuing agreement and concert of action among [the] defendants and co-conspirators" were that:

(a) The manufacture of tetracycline be confined to Pfizer, Cyanamid and Bristol.

(b) The sale of tetracycline products be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb.

(c) The sale of bulk tetracycline be confined to

[2] The principal official of each defendant company also was indicted, but the charges against these individuals were dismissed on the ground that they had acquired immunity by testifying before a grand jury. *United States* v. *Chas. Pfizer & Co.*, 245 F. Supp. 801 (S.D.N.Y.).

Bristol and bulk tetracycline be sold by Bristol only to Upjohn and Squibb.

(d) The sale of broad spectrum antibiotic products by the defendant companies and the co-conspirator companies be at substantially identical and non-competitive prices.

Count One of the indictment charged a conspiracy to exclude competitors from, and to fix or maintain prices in, the broad spectrum antibiotic market, in violation of Section 1 of the Sherman Act. The indictment listed twelve "means and methods" by which the conspiracy was effectuated. These alleged, in summary, that Pfizer and Cyanamid had licensed each other and Bristol to make tetracycline under their respective tetracycline and Aureomycin patents but refused to license all other applicants; that Cyanamid cooperated with Pfizer and assisted it in obtaining a patent on tetracycline; that Cyanamid and Pfizer withheld material information from the Patent Office and otherwise misled it; that Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's tetracycline patent; that except for a bulk sale of tetracycline by Cyanamid to Pfizer in 1954 to assist it in promptly entering the tetracycline market, only Bristol was permitted to sell bulk tetracycline, and only to Squibb and Upjohn, who agreed to buy all their requirements from Bristol; that Pfizer issued licenses to Squibb and Upjohn limited, at Bristol's request, to the sale and not manufacture of tetracycline products; and that the defendants and co-conspirators maintained substantially identical and unreasonably

high prices on their brands of broad spectrum products, and substantially identical customer classifications and dosage forms from November 1953 to at least July 1960 (33a–35a).

Count Two charged that the defendants and co-conspirators had conspired to monopolize the broad spectrum antibiotic market in violation of Section 2 of the Sherman Act, by agreeing to the terms of the conspiracy alleged in Count One (37a–38a).

Count Three charged that the defendants and co-conspirators had succeeded in monopolizing the broad spectrum antibiotic market in violation of Section 2 of the Sherman Act from November 1953 to at least August 1961 (39a–40a).

## THE FACTS

### BACKGROUND OF THE CONSPIRACY—PRIOR PRICE COMPETITION

Broad spectrum antibiotics (*i.e.*, antibiotics which are effective against a wide range of bacterial infections) were first marketed in 1948 when Cyanamid began selling chlortetracycline under its brand name Aureomycin. In September 1949 it received a patent on Aureomycin and certain processes for producing it (GX 1, 7353a–7357a). In January 1949, Parke, Davis & Company ("Parke, Davis")[1] began marketing chloramphenicol under its brand name Chloromycetin, and in October 1949 received a patent. In March 1950 Pfizer began marketing oxytetracycline under its brand name Terramycin; in July 1950 it

[1] Parke, Davis was not named as a defendant or co-conspirator.

received a patent (GX 918, 10300a–10308a; Ct. X 4, pp. 2–3, 6692a–6693a).

As each new product was introduced, there was active price competition. Cyanamid introduced Aureomycin at a price to druggists of $15 for a bottle of sixteen 250 mg. capsules.[4] Parke, Davis introduced Chloromycetin at $9.99, after which Cyanamid reduced its Aureomycin price to $10.00. Cyanamid and Parke, Davis both reduced their prices to $8.00 in February 1950. In March 1950 Pfizer introduced Terramycin at $8.40. In May 1950 Parke, Davis reduced its price to $6.00, and Cyanamid and Pfizer followed the reduction. In September 1951 Pfizer reduced its price to $5.10 and the other two companies followed (see 2745a–2748a). From October 1951 through July 1960 the prices for broad spectrum antibiotics remained substantially identical and unchanged. This remained the situation despite the marketing, beginning in 1953, of the newest and most important antibiotic, tetracycline, first by Cyanamid and Pfizer, and then also by Bristol, Squibb and Upjohn.

IMPORTANCE OF THE BROAD SPECTRUM ANTIBIOTIC MARKET TO CYANAMID AND PFIZER

Broad spectrum antibiotics were highly important and profitable items for Cyanamid and Pfizer even before the general introduction of tetracycline and despite the price competition that had occurred. In 1953 the total broad spectrum market (excluding

[4] Prices to retail druggists are referred to by the trade as "retail prices." Dates and prices are those shown in Ct. X 4, App. B, pp. 33, 67, 147, 6723a, 6757a, 6837a.

veterinary and foreign sales) amounted to approximately $78 million. Pfizer had almost half the market with Terramycin sales of more than $36.5 million, 29 percent of its sales of all products. Cyanamid had a nearly equal share with Aureomycin sales of $32 million. Parke, Davis had the remainder (GX 909, 10287a; GX879, 10248a). These drugs returned substantial profits. The record does not show Cyanamid's 1953 profits, but in 1952 its pre-tax profit on Aureomycin sales was $28.9 million. Pre-tax profit for Cyanamid's entire Lederle Division (including Aureomycin) were only $22.4 million, indicating the rest of the Division lost more than $6 million that year (GX 852; p. 4, 9866a; GX 879, 10248a).[5]

The only other broad spectrum antibiotic available prior to 1953, Parke, Davis' Chloromycetin, had received adverse medical reports in 1952 (3307a–3308a, 3350a). As a result Parke, Davis' sales (and market share) dropped from $22.5 million (22.5 percent of the market) in 1952 to $6.2 million (7.9 percent of the market) in 1953 (GX 909, 10287a).

TETRACYCLINE—ASSURANCE OR DISRUPTION OF THE MARKET

The advent of tetracycline, which was expected to compete well against Aureomycin and Terramycin, could either assure or disrupt Pfizer and Cyanamid's position in the broad spectrum antibiotic market (2749a–2750a, 2431a, 2461a, 2559a, 2760a, 3595a).

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[5] These figures are based on net sales of $59.1 million, about 35 percent of which are attributable to foreign and veterinary markets. Pfizer's profits on broad spectrum antibiotics for the pre-tetracycline years were not available. For Pfizer's profits several years later see p. 47 *infra*.

Tetracycline was the subject of several patent applications. Pfizer discovered its molecular structure in June 1952 and filed the first patent application for it in October 1952 (2446a; GX 6, 7535a–7542a). Cyanamid filed its patent application in March 1953 (GX 5, 7457a–7483a). The Heyden Chemical Corp., whose Antibiotic Division Cyanamid acquired in November 1953 (Ct. X 4, pp. 4–5, 6694a–6695a), filed an application in September 1953 (GX 8, 7567a–7618a). Bristol filed an application on tetracycline in October 1953 (GX 9, 7682a–7710a).

As Cyanamid's patent attorney explained at trial with reference to the competition there had been in penicillin, "* * * with no patents on tetracycline, you could imagine the same thing would happen, and not only if the price of tetracycline went down, it would take with it the price of Aureomycin * * *" (3686a). By November 1953, when the efforts to control the market began, Cyanamid had de-emphasized Aureomycin (2761a–2762a) and was irreversibly committed to tetracycline (2770a–2771a).

THE INITIAL PFIZER-CYANAMID AGREEMENTS

The patent applications that Pfizer and Cyanamid had pending in 1953 both relied upon the deschlorination of chlortetracycline (Aureomycin), on which Cyanamid held both product and process patents (2295a, 2254a, 2765a). Pfizer thought that its application probably would prevail over Cyanamid's (2319a, 2459a, 2559a). But Pfizer also knew that even if it obtained a patent it could not manufacture tetra-

cycline by deschlorination without obtaining from Cyanamid either a license to make Aureomycin or sufficient quantities of Aureomycin from which to manufacture tetracycline (2364a, 2560a). Cyanamid believed that it could prevent anyone else from manufacturing tetracycline by virtue of its Aureomycin patents (2768a, 2711a, 2783a, 2811a). Thus each thought itself blocked by the other.

In early November 1953, McKeen, the chief executive officer of Pfizer, called on Malcolm, the chief executive officer of Cyanamid's Lederle Laboratories, for the purpose of settling their tetracycline problems (2449a–2451a, 2767a–2768a). No agreement was then reached, but a subsequent meeting was scheduled for the following week (2452a). At the second meeting, McKeen and Powers, a Pfizer vice-president, called on Malcolm and Martin, the latter a Cyanamid vice-president (2282a–2286a, 2391a–2394a, 2452a–2453a, 2772a). At this meeting agreements as to tetracycline were reached. The agreements at that point were entirely oral. They went at least this far:

Pfizer and Cyanamid agreed to exchange proof of priority. The "loser" would concede priority in the Patent Office, and the "winner" would license the "loser" under its tetracycline patent at a 2½ percent royalty rate. Cyanamid would license Pfizer to make Aureomycin for the manufacture of tetracycline at a royalty of 2½ percent of the net sales value of the tetracycline sold by Pfizer, and would make available its know-how for the manufacture of Aureomycin, as well as its most efficient Aureomycin-producing cul-

ture. Pfizer would give Cynamid its know-how on the deschlorination of Aureomycin. Finally, Cyanamid would sell to Pfizer a large quantity of bulk tetracycline to permit Pfizer's early entry into the tetracycline market. The agreements, other than that relating to the sale of bulk tetracycline, were to become effective as soon as the Patent Office officially declared the interference on tetracycline (2302a–2304a, 2294a–2397a, 2454a–2458a, 2772a–2774a).

The government contended in the trial court and contends here that it was also understood between Pfizer and Cyanamid that neither would allow other companies into the market and that they would not compete with one another with respect to price.

IMPLEMENTATION OF THE PFIZER-CYANAMID AGREEMENTS

On December 23, 1953, the Patent Office officially notified Pfizer (GX 4, pp. 24–25, 7394a–7395a) and Cyanamid (GX 5, pp. 58–59, 7515–7516a) of the interference between their respective tetracycline applications. On January 11, 1954, the settlement agreement (GX 54, 8542a–8560a) and the Aureomycin license agreement (GX 53, 8527a–8541a) were signed. Without waiting for the formal settlement, between November 25, 1953, and March 31, 1954, Cyanamid sold to Pfizer 10,000 kilograms of bulk tetracycline at an average price of $387.50 per kilogram (Ct. X 4, p. 5, 6695a), a total sales price of $3,875,000. Pfizer was thus able with the help of Cyanamid to commence marketing tetracycline products under its trade name Tetracyn in January 1954 (Ct. X 4, p. 3, 6693a).

Though Pfizer and Cyanamid denied that they had in mind a particular resale price, the bulk price was approximately one-third the resale value of the product and the government alleges that the price reflected the drug industry's rule of thumb that the gross return of a product should be three times its factory costs (2285a–2296a, 2473a–2477a, GX 914–917, 10292a–10297a; 2900a).

After the signing of the formal agreements between Pfizer and Cyanamid, patent attorneys for the parties met to exchange information on priority. Shortly thereafter, they agreed that Pfizer had priority of invention (3782a–3789a, GX 465, 8921a–8922a). Cyanamid filed a concession of priority on its application in the Patent Office on February 2, 1954 (GX 7, pp. 6–7, 7561a–7562a).

In late January 1954 Pfizer justifiably believed that it would soon receive a patent on tetracycline (2315a), under which Cyanamid and only Cyanamid would be licensed. The government does not contend that it was illegal for Pfizer and Cyanamid to settle their patent dispute, but does contend that the settlement forms part of a pattern evidencing an understanding that the companies would not compete as to price and would combine efforts to prevent others from entering the market.

PFIZER'S NO LICENSE POLICY

Pfizer quickly publicly announced that it would use its tetracycline patent, when issued, to exclude all competitors, except Cyanamid, from the tetracycline market. At a meeting of security analysts held at Pfizer's plant on January 29, 1954, McKeen of Pfizer

announced that Pfizer's policy was not to grant licenses, except to Cyanamid, for the manufacture of tetracycline (2319a–2327a, 2484a–2485a). Pfizer understood that the remarks, which were meant to be relied on, would be "broadcast" (2326a–2327a). The meeting was reported in a "Drug Trade News" article, published on February 15, 1954, which quoted McKeen that Pfizer would object to the entry into the tetracycline field by firms not then in the field (GX 458, 8916a–8917a).

BRISTOL'S PATENT INTERFERENCE

Bristol's patent application for tetracycline had been rejected in December 1953 (GX 9, pp. 30–33, 7713a–7716a), but it filed a continuation application on a salt form of tetracycline (tetracycline hydrochloride) on January 15, 1954 (GX 10, pp. 1–29, 7887a–7916a). At the time, Pfizer attached little importance to Bristol's tetracycline application (2316a) and expected that its own tetracycline patent would be issued shortly (2315a). However, on March 1, 1954, the Patent Office declared an interference among the Pfizer, Cyanamid and Bristol applications on tetracycline hydrochloride (GX 12, pp. 1–2, 8094a–8095a).

The motive for cooperation between Pfizer and Cyanamid in limiting entry into the broad spectrum antibiotic market is shown in the record in the second interference proceeding.

Bristol expressed surprise that Cyanamid had joined Pfizer in opposing Bristol's application for a postponement and was thus seeking an early resolution

of the interference, since Cyanamid would be obligated to pay substantial royalties to Pfizer when a patent issued to Pfizer (GX 12, pp. 100, 8172a). Cyanamid explained why it favored the prompt issuance of a tetracycline patent to Pfizer (GX 12, pp. 114–115, 8186a–8187a, emphasis added):

> * * * Bristol Laboratories * * * commenced the manufacture and sale of tetracycline and are now offering it at reduced prices in the United States and in a substantial number of foreign countries. Cyanamid does not know how much tetracycline is being sold by Bristol, but it is evident that every dollar taken in by Bristol from their sales of tetracycline *is a dollar lost to Cyanamid or Pfizer.* * * *
>
> Worst of all, as the interference is delayed, the Bristol production and sales will undoubtedly increase in volume, and the selling price on the product will be lowered so that at the termination of the interference the profits which would normally accrue to *Cyanamid or Pfizer* from which research funds come, will have been reduced to nothing. * * *

At trial, Cyanamid's patent attorney at the time of the *Bristol* interference was reminded of a statement he has made in a brief in that proceeding (GX 12, p. 370, 8260a)), that prompt issuance of a patent to Pfizer, Cyanamid's ostensible competitor, would be "to the mutual advantage of the parties and to the public," and was asked what advantage there would have been to Cyanamid (3700a). The attorney (Edelblute) replied (*id.*) that

> We wouldn't have people like Bristol in the market for one, we wouldn't have the Italians importing it over here for another, and, of course, anybody—with no patent on tetracycline, any Tom, Dick and Harry with a little bit of money could get in the business.

### THE INITIAL REJECTION AND SUBSEQUENT GRANT OF THE TETRACYCLINE PATENT

On October 14, 1954 the Patent Examiner rendered his decision on all the motions in the second interference (GX 12, pp. 431–449, 8281a–8299a). He dissolved the interference as to all parties on his own motion, ruling that tetracycline was not patentable because production of Aureomycin inherently produced tetracycline. The examiner stated that although the inventors for whose work the Aureomycin patents were granted may not have realized that tetracycline was inherently produced with Aureomycin, the identification of tetracycline was not inventive, tetracycline being merely a purer form of an old product (GX 12, pp. 443–444, 8293a–8204a). The effect that this ruling would have had on Pfizer and Cyanamid would have been that the tetracycline market, rather than being restricted to Pfizer and Cyanamid, could have become subject to unlimited entry.

On November 24, 1954, the Examiner officially rejected Pfizer's tetracycline product claims. (GX 4, pp. 31–32, 7401a–7402a).

Despite the existence of co-production, Cyanamid's patent attorney had told the Examiner in December 1953 that Cyanamid "can unequivocally state that there has not been any tetracycline produced

by them, inadvertently or otherwise, in their operations" *i.e.*, in the production of Aureomycin (GX 5, p. 47, 7504a). He repeated during the second interference in 1954 that tetracycline was not inherently produced with Aureomycin (GX 12, p. 36, 8129a; pp. 381–383, 8271a–8273a). He did not verify these statements with Cyanamid's research staff (3704a–3708a), which had known of tetracycline's presence in Aureomycin since December 1953 (GX 58, 8577a; GX 74, 8631a), and in February 1954 had recorded this fact in a memorandum marked as having been sent to Cyanamid's patent attorney (GX 74A, 8632a).

After the dissolution of the second interference, Pfizer sought to overcome the Examiner's "speculation" of inherent co-production (GX 4, pp. 33–40, 7403a–7410a). It relied heavily on Cyanamid's production of "tons of chlortetracycline" and the representations of Cyanamid's counsel that no tetracycline had ever been co-produced. (GX 4, pp. 35–36, 7405a–7406a). Pfizer also presented affidavits describing experiments it had conducted in which recoverable quantities of tetracycline were not produced using Cyanamid's Aureomycin production process (GX 4, pp. 36–39, 7406a–7409a). Pfizer, however, did not inform the Examiner that it had used two of the lowest potency Aureomycin examples available which also had not produced usable quantities of Aureomycin, nor did Pfizer inform the patent office that its scientists had previously performed experiments which showed the presence of tetracycline in fermentation liquors used for producing Aureomycin (GX 40, 42, 43, 8436a–8437a,

8439a–8441a, 8442a–8444a; GX 907, pp. 3–4, 10282a–10283a; 4013a–4018a, 4022a–4023a). At the trial Bristol's patent representative testified that "this co-production had been common knowledge since late in 1953" (4207a, and see 4166a–4167a).

Pfizer's affidavits persuaded the Examiner to abandon the basis of his rejection of the tetracycline product claims.[6] On December 9, 1954, the Patent Office mailed Pfizer a Notice of Allowance of those claims (GX 4, pp. 63–64, 7433a–7434a). The patent issued officially on January 11, 1955 (GX 3, 7365a–7368a).

### BRISTOL ENTERS THE MARKET—WITH SQUIBB AND UPJOHN AS CUSTOMERS

In 1953 the financial condition of Bristol Laboratories was "shaky" (2875a). The advent of tetracycline presented Bristol with an opportunity to enter the highly successful broad spectrum antibiotic market (2874a–2875a, 3004a–3005a, 3011a).

Bristol, not wishing to rely solely on its patent claims, tried in the fall of 1953 to arrange a cross-licensing agreement with Cyanamid whereby the winner of the tetracycline patent would license the loser. Cyanamid flatly refused (2779a–2781a, 2876a–2878a, 3009a). After learning of Cyanamid's concession of priority to Pfizer, Bristol asked Pfizer whether Pfizer would use its patent, if granted, to keep Bristol from

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[6] The Examiner testified that, in his view, "any identifiable amount of tetracycline present in this production of Aureomycin would have prevented issuance of a patent to tetracycline" (4400a). On misrepresentation before the patent examiner see *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F. 2d 574 (C.A. 6), certiorari denied, 394 U.S. 920.

entering the tetracycline market. Pfizer stated that it would (GX 48, 127, 8475a, 8726a).

Bristol, none-the-less, began marketing tetracycline products under its own label in May 1954. Since Bristol's sales force was small, it decided to sell bulk tetracycline to two other drug companies (1817a–1818a, 2894a, 3012a–3016a). Squibb agreed to become a customer (2893a). Parke, Davis was Bristol's second choice, but it turned down Bristol's offer in September 1954 (2894a–2895a, 3317a–3318a). Bristol then approached Upjohn, which had the largest organization for calling upon doctors and druggists (3182a), and Upjohn accepted Bristol's offer to become a bulk customer (2895a–2896a).

In September 1954, Bristol began selling bulk tetracycline to Squibb and Upjohn. Squibb and Upjohn were eager to enter the market and initially agreed to purchase from Bristol and to indemnify Bristol for any patent infringement damages it might suffer (2896a–2899a, 3162a–3164a; GX 424, 8901a–8911a). They were not contractually bound to continue to purchase only from Bristol but no one else was offering bulk tetracycline. In the summer of 1955 Bristol lowered its bulk price to Squibb and Upjohn to a level permitting them to earn at the established price the usual gross return of three times factory costs (2900a, 3178a–3179a; GX 405, 8821a–8823a).

The continued existence of Bristol Laboratories depended upon its ability to sell bulk tetracycline to Upjohn and Squibb (2903a, 3148a). When Pfizer was granted the tetracycline patent, the same day it filed

infringement suits against Bristol, Squibb and Upjohn.[7] In answer to Pfizer's complaints against them and in reply to Pfizer's counterclaims, Bristol, Squibb and Upjohn each alleged the invalidity of Pfizer's tetracycline patent on a number of grounds, including lack of invention and misleading the Patent Office (GX 22, 23, 24, 28, 29, 30, 8399a–8405a, 8412a–8420a). In January 1955, soon after Pfizer filed suit, Upjohn's General Counsel wrote to Gilmore, Upjohn's chief executive officer, expressing the hope that in any settlement that might be reached Upjohn would receive a "license without limitations", that is, a license "to make and sell"; but he also recognized that Bristol might seek for itself a license to "make and sell" and obtain only a license to sell for Upjohn as a means of tying Upjohn to Bristol (3190a, 3199a). Gilmore testified at trial that Upjohn wanted as broad coverage as possible including, specifically, the right to manufacture tetracycline (3192a, 3205a–3206a).

Gilmore had two discussions with McKeen of Pfizer in early October 1955, at which he told McKeen that Upjohn would like to settle and take a tetracycline license from Pfizer "to make, use and sell or have made for" Upjohn. Pfizer made no commitment and indicated that Pfizer was not then inclined to discuss settlement (2508a–2513a, 3201a–3217a; GX 423, 8877a–8884a).

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[7] Pfizer's suits were filed on January 11, 1955, alleging infringement of its tetracycline patent (GX 15, 16, 17, 8383a–8388a). Squibb, Upjohn and Bristol then filed actions against Pfizer seeking declaratory judgments that they were not infringing Pfizer's patent (GX 18, 19, 20, 8389a–8395a); Pfizer

Upjohn reported this conversation to Bristol, which quickly sought to negotiate an arrangement with Upjohn that would secure Upjohn as a bulk customer (3224a, 2903a–2905a). An agreement with Upjohn (GX 108, 8698a–8705) was signed on November 3, 1955. Among other things, the agreement required Upjohn to purchase its entire tetracycline requirements from Bristol for the duration of the Pfizer litigation plus three years,[8] and gave Bristol "entire control" of the Pfizer litigation and settlement, with the understanding that any license Bristol secured for Upjohn "may, however, *be limited* to your [Upjohn's] right to purchase, use and sell tetracycline to the drug trade * * *." Bristol also assumed liability for possible infringement by Upjohn.

Bristol signed an identical agreement with Squibb on November 18, 1955 (GX 83, 8639a–8647a).

The effect of this arrangement, if Pfizer concurred, was to enable Bristol to settle the Pfizer litigation for itself, Upjohn and Squibb under terms which insured that Upjohn and Squibb could not themselves manufacture tetracycline and would have to purchase it from Bristol. It also had the effect of halting any fur-

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counterclaimed for damages of $15,000,000 against Bristol (GX 25, 8406a–8407a), $30,000,000 against Upjohn (GX 26, 8408a–8409a), and $6,000,000 against Squibb (GX 27, 8410a–8411a).

[8] This all-requirements provision, which was scheduled to expire on March 28, 1959 (the Pfizer litigation was settled March 28, 1956), was subsequently renewed for annual periods up to March 28, 1962, for Upjohn (GX 671, 672, 673, 8974a–8978a) and to March 28, 1961, for Squibb (GX 688, 689, 8979a–8982a).

ther attempts by Upjohn and Squibb to negotiate or settle with Pfizer independently.

PFIZER, BRISTOL, SQUIBB AND UPJOHN REACH AN AGREEMENT

The settlement of the Pfizer patent litigation was precipitated by what was known as the Broady incident (2633a). Broady, a private detective, was tried and convicted in New York for illegally tapping the telephones of Bristol and Squibb. At his trial, it was revealed that Broady had been retained by Pfizer's general counsel, although no evidence was introduced that implicated Pfizer in the specific wire tapping. After Bristol learned this, it directed its patent attorney to tell Pfizer's patent attorney that Bristol would use the Broady incident in the patent litigation and would file a counterclaim based on that incident. On December 14, 1955, the day after Pfizer's patent counsel was so notified, he and McKeen, Pfizer's chief executive, went to the offices of Bristol's patent attorney to negotiate a settlement (2515a–2517a, 2889a–2890a, 3135a–3137a).

As a result of the meeting, Pfizer and Bristol signed a letter of intent on December 15, 1955 (GX 95, 8678a–8681a) and on March 28, 1966, Pfizer and Bristol signed formal agreements that terminated the litigation upon the following terms:

> (1) Pfizer licensed Bristol to manufacture, use and sell tetracycline at a royalty of 3½ percent of the net sales price of tetracycline products sold by Bristol and its "presently existing bulk customers" (GX 50, 8480a–8500a) which Pfizer knew were Upjohn and Squibb (2534a–2536a).

(2) Upjohn and Squibb received licenses to "purchase, compound and use" tetracycline and "to sell the same in the form of Therapeutic Tetracycline to the Drug Trade," also at the same 3½ percent royalty (GX 51, 52, 8501a–8513a, 8514a–8526a).[9] They could not manufacture or sell in bulk.

(3) The licenses provided that the licensees would not contest the validity of Pfizer's tetracycline patents nor voluntarily assist others in any infringement of the patents (GX 50, Art. VIII, 8496a–8497a; GX 51, Art. VII, 8509a–8510a; GX 52, Art. VII, 8522a–8523a).

A formal settlement agreement, executed simultaneously with the license agreements, provided that all the pending lawsuits would be dismissed without prejudice, and released the parties from any further claims based on the tetracycline patent (GX 86, 8652a–8656a).

PRICING PRACTICES

Total broad spectrum antibiotic sales from 1954 to 1961 were more than $1.1 billion, of which the defendants and co-conspirators accounted for approximately $855 million.[10]

From October 1951 through July 1960 published prices on broad spectrum antibiotic drugs to retailers, wholesalers and private hospitals, by far the most im-

[9] Not more than one royalty to Pfizer was to be payable per unit of tetracycline (GX 50, 51, 52).

[10] GX 875, 10244a. Parke, Davis sold the rest.

portant segment of the market,[11] remained substantially identical and unchanged [12] (see GX 920–927, 930, 10310a–10318a, 10324a). The price schedules used by the defendants and co-conspirators through July 1960 were based on suggested prices to consumers from which set discounts were taken to derive the prices to be charged the various classes of customers (see 1745a–1746a, 2482a–2484a, 3272a–3273a). For example, for the largest selling product form—bottles of 100 capsules of 250 milligrams each—the prices in effect for all the drugs and all the companies from October 1951 through July 1960 were:

| | |
|---|---|
| List price | $51.00 |
| Retail (druggists and private hospital) | 30.60 |
| Wholesale [13] | 24.22 |

In addition to the substantially identical catalogue prices, the defendants and co-conspirators gave no quantity discounts on broad spectrum antibiotics, as they did on other drugs (1862a–1863a, 2538a–2540a, 2995a).

This price identity was in contrast to the prior history of price reduction in the broad spectrum antibiotic market as new products were introduced (2746a–

[11] Tetracycline sales to retailers and wholesalers constituted approximately 77 percent and sales to private hospitals were an additional 11 percent of total tetracycline product sales from 1954 through 1961 (GX 885, 10255a–10256a).

[12] A sample of the invoices of defendants and the co-conspirators showed that virtually all sales to retailers and wholesalers were invoiced at the published prices (Ct. X 10, pps. 2–3, 6938a–6939a).

[13] Upjohn did not sell to wholesalers. Squibb's price to wholesalers was $25.70 and Pfizer's wholesale price for Terramycin was $24.48 (GX 930, 10324a).

2748a; *supra* 8), and in contrast to the price competition in penicillin (3686a). As each company, except Parke, Davis, introduced tetracycyline and as it became more and more important (GX 876, 10245a) there was no fluctuation in the price either of tetracycline or the other broad spectrum antibiotics. Tetracycline captured almost half of the broad spectrum antibiotic market within a year of its introduction (*ibid.*) without a change in price of either tetracycline or the other products.

The prices remained unchanged although sales of tetracycline products first increased rapidly and then declined. From 1954 thru 1960, sales of all tetracycline products varied as follows:

| | |
|---|---|
| 1954 | $39,593,000 |
| 1955 | 65,202,000 |
| 1956 | 73,277,000 |
| 1957 | 114,362,000 |
| 1958 | 98,349,000 |
| 1959 | 96,699,000 |
| 1960 | [14] 81,382,000 |

During these years of shifting sales volume and identical prices there were significant changes in the market shares of the defendants and co-conspirators. For example, Upjohn (a high cost producer, see page 26, *infra*) increased its sales of tetracycline products from a low of 10.9 percent of the market in 1956 to 11.6 percent in 1957, 15.3 percent in 1958, 19.6 percent in 1959 and 22.2 percent in 1960.[15] Pfizer, a low cost producer, after having reached a peak of 21.6 percent of total tetracycline sales in 1958, declined to

[14] GX 876, 10245a.

[15] *Ibid.*

16.8 percent in 1959 and 15 percent in 1960 without a change in price (GX 876, 10245a).

The failure of the companies to respond to significant changes in demand and market share is not explainable by identical costs that in some industries lead to identical pricing. The production costs did not remain stable but steadily declined.[16] Further, the different companies' costs were not identical. The records kept by the companies in the regular course of business showed that production costs for the standard unit of 100 capsules of 250 milligrams each declined overall from $2.26 to $1.52 for Cyanamid, from $3.87 to $1.70 for Pfizer, and from $6.24 to $1.67 for Bristol. Squibb's and Upjohn's production costs for the same period declined from approximately $13.00 to $7.71 (GX 934, 10325a).

Nor did slim profit margins prohibit price competition. Mr. Schwartz, the chief executive of Bristol, testified that "[t]here is a sort of old rule of thumb in the pharmaceutical business that you need four times your * * * factory cost and that gives you enough money for research, to promote, hire salesmen, take care of general overhead, depreciation and all those things. But that below three for one, * * * you cannot find enough funds to promote effectively and research

[16] GX 934, 10325a, a compilation of production costs made from records the companies kept in the regular course of business. Cyanamid: GX 844, 845, 9279a–9395a; Pfizer: GX 841, 9176a–9268a, 1954a–1955a; Bristol: GX 837, 9051a–9138a, 1685a; Squibb: GX 867, 868, 10191a–10206a, 2221a; Upjohn: GX 863, 10087a–10118a, 1865a.

effectively * * *" (2900a). Mr. Gilmore of Upjohn also spoke of the 3 to 1 rule (3173a–3176a, see also GX 424, 8889a–8911a). Upjohn and Squibb, both large and long established drug manufacturers, were willing to invest large sums in tetracycline in order to make their "normal" profits (2899a–2901a; 3172a–3180a). To insure such profits they secured agreements with Bristol guaranteeing them bulk tetracycline at $350.00 a kilogram, roughly one third the established price for the finished product (*ibid.*). In contrast Bristol, Pfizer and Cyanamid made many times this "normal" profit: comparing the list prices shown on page 24, *supra*, to production costs for the same standard dosage, in 1960 Pfizer's production cost was $1.70 and Cyanamid $1.52 for a product they would sell to a druggist for $30.60.

Pfizer and Bristol kept records in the regular course of business showing, product by product, the difference between factory or production costs and sales price a figure labeled "gross profits" by both companies (GX 192, 8760a–8761a; GX 838, 9139a–9163a; GX 842, 9269a–9273a). Their records also showed an "operating" or "adjusted" profit after the deduction of certain selling and promotional expenses, but no "net profit" after deduction of all costs (1794a, 1977a). Cyanamid's records showed net profits, item by item (GX 852, 9862a–9928a; GX 858, 9938a–9981a).

These records (except for GX 858, which was introduced by Cyanamid, 2079a–2080a) placed in evidence by the government and the analysis made from them confirm the wide gap between both gross

and adjusted profits for broad spectrum antibiotics and gross and adjusted profits for the average of all other pharmaceuticals (*e.g.*, GX 842, 9269a–9273a, GX 852, 9865a–9928a). For example, Cyanamid's records show that in 1954 it made a pre-tax profit of $34,502,000 on broad spectrum antibiotic net sales of $73,914,000—this is after deduction of all expenses attributable to these items, including research (GX 852, 9874a).

Each of the defendants and co-conspirators published catalogue prices for private hospitals (Ct. X 4, 6696a), and Cyanamid, Bristol and Upjohn published prices for city, county and state (CCS) hospitals and for the federal government (Ct. X 4, App. B, 6719a–6846a). Because of factors peculiar to the hospital and federal markets, sales of antibiotics to these classes of customers were not accompanied by the same degree of uniformity as sales to the prescription market (*i.e.*, to retailers and wholesalers). For example, sales to private hospitals were often accompanied by "free goods," whereby the seller offered a quantity of products free with the purchase of a given product (see *e.g.*, 1836a–1838a, 2587a–2589a, 3065a–3067a). In the federal and CCS markets, sales were usually by formal bids, and prices did vary and in general trended downward (Ct. X 9, 6920a–6936a; Ct. X 11, 6943a–7329a–1; 2586a–2590a).

In bids for federal government procurements when European firms competed, however, their offers were often one-third to one-half those of American firms

(Ct. X 9, 6928a, 6932a–6936a). Whether European producers competed or not, there was no tendency by the American firms to move from an established price range (Ct. X 9, 6923a–6936a). American bids were often nearly identical and in some instances firms with identical bids were unwilling to reduce prices to obtain a contract. (*ibid*).

In one instance the Military Medical Supply Agency (MMSA) in 1957 requested bids on 454,930 bottles of tetracycline oral suspension in 75 cc bottles and received quotations of $1.83 per bottle from Bristol, Pfizer and Cyanamid (Ct. X 9, p. 7; 6926a). But because Pfizer bid on the basis of 70 cc bottles the request for bids was withdrawn. The MMSA then offered to give Pfizer the entire award if it would lower its price by several cents per bottle, an offer which Pfizer rejected, but countered with an offer to share the award with Bristol since they had bid the same price. The MMSA rejected this offer and reissued the bid but for 70 cc bottles (2606a–2607a, 2648a–2659a, GX 897, pp. 2–3, Ct. X 9, p. 4 6926a, 10269a–10270a). Pfizer and Cyanamid again submitted bids of exactly $1.83 per bottle, but Bristol submitted a bid of $1.828 and won the award, which totalled $830,624.92 (Ct. X 9, p. 4, 6926a, GX 906, p.1. 10277a).

Bristol won the award not by competing on its tetracycline price but because at the request of the MMSA Bristol determined that it could get the 70 cc bottles at .2 cents less than 75 cc bottles (GX 905, 10276a), and Bristol passed on the "savings," which

totalled $908.60, to the MMSA. Bristol's Treasurer calculated that the pre-tax profit on this contract, which constituted almost the entire federal business Bristol did in 1957 (2975a), "is expected to be $562,000" (GX 188, 8745a–8748a).

THE PROCEEDINGS BELOW

The trial lasted nine weeks; the printed record contains more than 12,000 pages. The government's case involved three broad categories of proof: (1) data bearing on prices, production costs, gross profits and market shares; (2) testimony of defendants' officials concerning the various arrangements among the defendant companies and co-conspirators; and (3) testimony and documents relating to the misleading of the patent examiner. Defendants' strategy was to develop their defense largely through cross-examination of their own officials during the government's case. Pfizer called one witness; the other defendants offered no evidence after the government's case was completed. The district court delivered a lengthy charge, and the jury returned guilty verdicts.

In reversing the convictions, the court of appeals held that the instructions to the jury were erroneous in five respects; and that on one of those five issues the trial court had improperly restricted the defendants' ability to argue to the jury. We discuss these rulings in detail in the argument.

A principal ground upon which the court of appeals reversed was the court's conclusion that the case was submitted to the jury on a different theory from that specified in the indictment and the bill of particulars.

The court interpreted these documents as charging that specific agreements had been entered into at specific meetings between specific individuals, *i.e.*, at the Pfizer-Cyanamid meetings in November 1953 and the Pfizer-Bristol meetings in December 1955. But the charge treated the case as based upon a general course of conduct throughout the years, thus, the court of appeals held, misleading both the jury and the defense.[17]

The court further held that because the case was based upon specific agreements, the testimony of defendants' officials denying the existence of any illegal agreements or understandings was crucial and the jury should have been told that in order to convict it had to find that those officials had lied. The court of appeals also ruled that the instructions unduly stressed the evidence relating to unreasonably high prices and profits and fraud on the Patent Office, thereby distracting the jury's attention from whether the participants had entered into illegal agreements at the meetings.[18]

Following the grant of the government's petition for rehearing *en banc*, the panel issued a short opinion denying rehearing (12617a–12619a; 437 F. 2d 957). The panel acknowledged that it had failed to take adequate account of the portions of the bill of particulars alleging a tacit understanding or agreement. The panel stated that "we do not rely upon the express agreement contention as a ground for reversal." It concluded, however,

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[17] 12587a, 12590a, 12593a, 12594a–12602a, 12610a–12611a; 426 F. 2d at 34, 36, 37, 38–43, 47–48.

[18] 12598a–12600a, 12602a, 12611a, 426 F. 2d at 40–41, 43, 48.

that "taken as a whole" the other errors found denied the defendants a fair trial.

On the basis of the opinion denying rehearing, the full court, dividing four to three, denied rehearing *en banc* (*id.*).

## SUMMARY OF ARGUMENT

After a long and fairly conducted trial in which the government presented comprehensive evidence of conspiracy to fix prices and to monopolize, and in which the defendants presented little evidence in rebuttal, the jury convicted all three defendants on all counts.

The court of appeals reversed primarily for faults it found in the charge to the jury. These faults related principally to what the court of appeals found to be incorrect emphasis on certain issues in the trial. The court of appeals, however, as it recognized in its second opinion, initially mistook the case as one in which an express agreement at a particular time and place had to be proved, rather than a course of conduct showing a tacit agreement or understanding not to compete as to price and to restrict entry into the market. The court of appeals also applied an inappropriate standard for judging the instructions by combing the record for possible errors or for language that viewed in isolation might be criticized but that was correct in the context of the lengthy trial.

## I

The jury had full evidence on the market and the defendants' pricing policies. The government intro-

duced and relied on exhibits taken from respondents' records and the testimony of respondents' officers. This evidence showed standardized packaging and pricing, high profits, and failure of any of the respondents to lower prices as production costs dropped, as market shares were lost, and as new products were introduced, despite prior price competition in the same market. Respondents were permitted to present countervailing evidence but as a matter of trial strategy did not do so.

The government also presented evidence that the respondents misled the patent office, settled patent claims, sold to one another, licensed one another and refused to license others in a manner consistent only with an understanding that they would not compete as to price and would prohibit others from entering the market.

The court's charge on these important issues properly instructed the jury on the right of the respondents' independently to charge whatever prices they wish, the significance of patents, the right of a holder to grant licenses or not as he sees fit but not to agree with his licensees not to license others and the right of the parties to sell to one another. It stressed that the jury must decide whether this and the other evidence presented it showed an agreement or understanding between two or more of the defendants that they would not compete as to price and would restrict entry into the market. The instructions were careful, fair and in accord with the decisions of this Court.

II

Parke, Davis was neither indicted nor named as a co-conspirator, although many of its practices were similar to those of the respondents and co-conspirators. The government admitted that it did not consider Parke, Davis a conspirator and pointed out the many differences between its conduct and that of the conspirators. The respondents sought an instruction in which the judge would list the similarities between respondents' behavior and that of Parke, Davis without mentioning the differences. Respondents also wanted to argue the "presumption of innocence of Parke, Davis."

The trial judge properly refused these requests the first as one sided, the second out of concern that it would confuse the jury by suggesting that indictment removes the presumption of innocence. The judge properly allowed the parties to argue fully the significance of the similarities and differences between Parke, Davis and the respondents and co-conspirators but not to argue a presumption of innocence of a non-party. The charge given by the trial judge was fair and his handling of this issue was careful and correct.

III

Pfizer and Bristol (which represented Squibb and Upjohn in the negotiations) settled their patent dispute by a license from Pfizer to Bristol to manufacture tetracycline, sell it in bulk to its present customers, and sell it to the trade. Bristol obtained from

Pfizer for Squibb and Upjohn, licenses to sell to the trade but without permission to manufacture or sell in bulk. The effect was that Pfizer avoided embarrassing litigation and Bristol made certain that Squibb and Upjohn would remain customers. The government did not claim that these agreements were illegal *per se* but only that they formed part of the circumstantial evidence of conspiracy. The trial judge properly so instructed the jury. The trial judge referred to the licenses to Squibb and Upjohn as restricted. This was the same terminology the respondents and co-conspirators had used in testimony in the trial.

The supposed errors that the court of appeals found reflect an out-of-context interpretation of language meant to be understood by a jury familiar with the terminology of the witnesses. The district judge properly refused to instruct the jury that they could not consider these agreements as part of an agreement to limit manufacturing rights. The court correctly instructed that evidence of the settlements and licenses should be considered with all other evidence to determine "whether [it shows] the presence of a conspiracy, the absence of a conspiracy, or nothing either way" (4966a–4967a).

## IV

The government did not allege or attempt to prove that Bristol had joined the conspiracy prior to its settlement with Pfizer in December 1955. The court of appeals would have required an instruction that Bristol's pre-December 1955 conduct could not be considered as proof of conspiracy, and complained that the instruction the judge actually gave may have allowed the jury to

convict Bristol if it found Bristol conspired even before December 1955. This is pure speculation ungrounded in the record. It was clear throughout the trial that the government was not claiming that Bristol entered the conspiracy prior to its December 1955 agreement with Pfizer. Evidence of Bristol's activities before December 1955 was nevertheless important and admissible as showing Bristol's motive for joining the conspiracy, its method of operation, and how the conspiracy came about.

V

Considered together any possible errors were not of sufficient magnitude to justify reversal of a jury verdict in a trial that was essentially fair and in which respondents had both the resources and legal talent to present their case fully to the jury. To allow the appellate decision to stand will create a dangerous impediment to the enforcement of laws designed to insure competition and free entry into the marketplace. Perhaps more important, the precedent could become a ground for reversal in any case where organized or complex criminal activity is at issue and the trial is lengthy and routine instructions cannot be relied upon.

## ARGUMENT

### INTRODUCTION

"In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure."

*Johnson* v. *United States*, 318 U. S. 189, 202 (Frankfurter, J. concurring). This was a trial in which the government proved that the three defendants and two co-conspirators had held to virtually the same prices for all broad based antibiotics from six to ten years, despite changes in supply, demand, market shares, production costs, and despite the introduction of tetracycline.

The jury had comprehensive exhibits, facts, and figures showing that this was not normal market behavior and that no exigencies of cost dictated the rigidity of prices. In addition, the jurors heard from the mouths of the corporate executives a history of prior competition replaced by cooperation, intercompany sales and licensing, and withholding information from the Patent Office to obtain and preserve a questionable patent.

The jury was in a position to judge the credibility of the witnesses and to gauge the significance of the evidence to the charges of conspiracy. The instructions to the jury repeatedly directed them to the question: Did this all come about by independent action or did the defendants have an agreement or understanding—did they conspire?

There was ample evidence to convict. The jury did convict and it is unlikely that the jury would have been misled by any subtleties of the judge's instructions.

The appellate court considered this a "close case." It approached the language of the charge with a punctiliousness, we submit, more appropriate to statutory

interpretation or contractual ambiguity than to a careful and comprehensive charge to a jury considering the extensive evidence in a complicated antitrust case. We submit this standard was inappropriate.

In its two opinions, the court of appeals criticized various portions of the trial judge's instructions. For convenience we have divided these into four major groups:

1. The instructions concerning defendants' prices and profits, the denial of wrongdoing by defendants' officials, and the history of the tetracycline patent applications.

2. The instructions concerning Parke, Davis, which was not a conspirator and whose activities paralleled the conspirators in some respects but not in others, and the scope of argument permitted.

3. The instructions concerning the Pfizer-Bristol arrangements and the grant of non-manufacturing licenses to Squibb and Upjohn.

4. The instructions pertaining to activities of Bristol before it joined the conspiracy.

We submit that upon reviewing the instructions in these areas, it is clear that while there can be *ex post facto* discussion as to whether particular language should or should not have been used, the instructions in their totality were in accordance with the law and scrupulously fair.[19] The instructions, of course, must be viewed as a whole and in the context of the entire

[19] For a careful discussion of the instructions in this trial, see the opinion of the district court denying respondents' motion for a new trial (6446a–6473a, 281 F. Supp. 837 (S.D.N.Y.)).

trial; particular portions of the charge must not be viewed in isolation or treated as if they constituted the court's entire treatment of the subject. Cf. *Andres* v. *United States*, 333 U.S. 740, 745; *Kotteakos* v. *United States*, 328 U.S. 750, 763; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242.

I. THE INSTRUCTIONS CONCERNING PRICES AND PROFITS, THE DENIALS OF WRONGDOING BY DEFENDANTS' OFFICIALS AND THE HISTORY OF THE TETRACYCLINE PATENT APPLICATIONS WERE CORRECT.

A. IN AN ANTITRUST CONSPIRACY CASE, EVIDENCE THAT SUPPOSEDLY COMPETING FIRMS MAINTAIN UNIFORMLY HIGH PRICES OVER AN EXTENDED PERIOD DESPITE SHIFTING MARKET SHARES AND DIFFERING PRODUCTION COSTS, IS A SIGNIFICANT FACTOR TO BE CONSIDERED WITH OTHER CIRCUMSTANTIAL EVIDENCE.

In its initial opinion, the court of appeals based its condemnation of the instructions dealing with the allegations of "unreasonably high prices and profits" on the ground that the time devoted in the instructions to this issue overemphasized the importance of this admittedly relevant evidence at the expense of the "primary issue"—whether express agreements were made at the "critical" November 1953 and December 1955 meetings (12598a–12602a, 426 F. 2d at 41–43). It concluded that because of this supposed imbalance in the instructions "the jury * * * entered upon its deliberations with its attention diverted from the real issues to patent fraud and unreasonably high prices—both inflammatory issues" (12602a, 426 F. 2d at 43). But the court of appeals in its first opinion was mistaken as to the primary issue of the case, as it ac-

knowledged in its second opinion (12618a, 437 F. 2d 957). The issue was not whether there was an express agreement but whether all the evidence of defendants' conduct showed a tacit understanding that the respondents would not compete as to price and would restrict entrance to the market. This fundamental error in the first opinion of the court of appeals permeated the court's consideration of the case and led to the erroneous reversal. The trial judge did not similarly misconstrue the nature of the case.

High prices of themselves do not prove an illegal conspiracy in violation of the Sherman Act. See, *e.g.*, *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 395–401; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222, 229, 243. On the other hand, the level of prices and profits has a most important bearing on the charges of both conspiracy and monopolization in a case such as this. This Court has recognized that "an artificial price level not related to supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred." *Cement Mfrs. Protective Assn.* v. *United States*, 268 U.S. 588, 606.

In *American Tobacco Co.* v. *United States*, 328 U.S. 781, this Court noted that the defendants, who had raised their prices during a period of declining manufacturing costs and maintained them although demand fell, had reaped "tremendous profits as a result of the price increase." *Id.* at 805–806. This price increase—unrelated to "costs of production or to economic con-

ditions generally" (147 F. 2d 93, 103 (C.A. 6))—and a price reduction made only when competition from others was felt, were said to constitute "circumstantial evidence of the existence of a conspiracy and of a power and intent to exclude competition." *Id.* at 328 U.S. at 804. Again, in *United States Maltsters Ass'n* v. *Federal Trade Commission,* 152 F. 2d 161, 163 (C.A. 7), proof that prices had remained stable while the cost of the principal ingredient of manufacture "varied considerably" and the "manufacturing costs of the various members [of the Association] varied as much as 20 to 30%" was part of the circumstantial evidence relied on to support an inference of conspiracy. See, also, *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F. 2d 175, 179 (C.A. 7), affirmed *sub nom. Clayton Mark & Co.* v. *Federal Trade Commission,* 336 U.S. 956; *United States* v. *Eli Lilly & Co.,* 24 F.R.D. 285, 289–294 (D.N.J.).[20]

If firms accused of price-fixing or monopoly object to the government's economic analysis, they may introduce their own evidence "that they were following an economically dictated practice of conscious parallelism of prices, rather than engaging in any illegal con-

[20] See also *C-O-Two Fire Equipment Co.* v. *United States,* 197 F. 2d 489, 492 (C.A. 9), certiorari denied, 344 U.S. 892, and Areeda, *Antitrust Analysis:* Problems, Text, Cases, 222 fn. 22 commenting on *C-O-Two:* "The finding of conspiracy is not only supported but compelled by evidence of identical prices coupled with such 'plus factors' as previous illegal conduct, 'artificial' product standardization, raising prices at a time of surplus, policing dealers to effectuate resale price maintenance, uniform use of a delivered pricing system, and submission of identical bids to public agencies."

spiracy to fix prices." *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 141 (C.A. 6). Sherman Act defendants may offer "explanatory economic evidence" consisting of "proofs of similarity of costs, operations, marketing procedures, and other economic factors affecting price changes, alleged to be common to all, and [have] expert witnesses * * * testify in support of their theory." *Id.* at 141, 146. See also *Maple Flooring Mfrs. Ass'n.* v. *United States*, 268 U.S. 563, 567–568; *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 367–369 (C.A. 8), certiorari denied, 339 U.S. 942; *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914, 951–952 (S.D.N.Y.).

High profits are also relevant "along with myriad other circumstances for the purpose of determining whether in combination they are elements in the generation of that power to monopolize that constitutes violation of the law." *United States* v. *General Electric Co.*, 82 F. Supp. 753, 895 (D. N.J.); see *id.* at 894–895; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 804–806; *United Banana Company* v. *United Fruit Company*, 245 F. Supp. 161, 176–177 (D. Conn.), affirmed, 362 F. 2d 849 (C.A. 2); *Banana Distributors, Inc.* v. *United Fruit Company*, 162 F. Supp. 32, 39 (S.D. N.Y.), reversed on other grounds, 269 F. 2d 790 (C.A. 2).[21]

[21] See the district court post trial opinion, 6453a–6461a, 281 F. Supp. at 842–848.

B. THE INSTRUCTIONS ON THE SIGNIFICANCE OF PRICES AND PROFITS WAS APPROPRIATE AND CORRECT

The court's charge on evidence of high prices was both legally correct and fair. The essence of the charge was as follows:

> I come now to the allegation among the asserted "means and methods" that defendants maintained prices which were "unreasonably high." It is necessary to leave you with several thoughts concerning this specific topic.
>
> To begin with, I must emphasize and be sure you understand with perfect clarity, that neither the Sherman Act nor any other law that concerns us in this case imposes any limit on the price a company may charge for its commodity. So far as the law is concerned, so far as we have it for this case, a manufacturer is perfectly free to produce a commodity that costs him a dollar and sell it for $100 if he can find customers willing to pay that amount.
>
> The Sherman Act does not entitle any court or any jury to impose personal or private or any other kinds of restrictions upon the setting of prices by businessmen exercising their independent and competitive and self-interested judgment. It would be utterly wrong in short for any of us to be influenced even in the slightest degree in this case by any notion that drug prices were too high or too low or even just right, and I add those words "just right" to be sure that we return to and stay centered upon the true problem in this case, and that is the subject as I have repeated it over and over again, of alleged price fixing by agreement.

I have told you before, and stress it again, that this is the kind of conduct against which the Sherman Act is directed in the aspect of present relevance. If prices are fixed in the way forbidden by that Act, it makes no difference that they are fixed at a happy or low or suitable or high and unpleasant level. Price fixing at any level is what is outlawed.

I am trusting that you have these repeated thoughts firmly in mind. I return then to the question of what significance, if any, there may be in this case in the charge that the defendants' prices were "unreasonably high."

In the light of what I have just said, I think you will find it helpful to translate the word "unreasonable" to mean "unusual" or "artificial" or "extraordinary." By these suggested definitions I am trying to convey the thought that the idea of unreasonableness in the present context is meaningful only if it is understood to refer to kinds of price behavior or price levels which appear to be divorced from variations and differences in available supply or demand or cost or other economic factors that may normally be expected to cause variations or changes in the prices charged in a competitive market.

To put the thought in another and slightly shorter way, the charge of unreasonableness in this case is material only insofar as it poses the issue whether the prices involved exhibited qualities or peculiarities of a type that could be deemed evidence that such prices resulted from agreement rather than from competition. [4993a–4994a.]

This is not the court of appeals telling the district court what its charge should have been. This is the district court's charge in the press and heat of trial. It would be hard to draft a less inflammatory charge." The judge directed the jury away from emotion and towards the law.

Concerning the comparison of production costs to prices, the court cautioned the jury that production costs omitted cost items that should be included to calculate net profits. The court reminded it of the defendants' contentions that gross profit data are misleading and meaningless, that their prices were in no way unreasonable or artificial, and that competition often results in price uniformity despite variations in production costs among sellers. Finally, the court instructed that if the jury did not find defendants' prices and profits unreasonable, it should not consider that allegation; but that if it did find prices and profits unreasonable, that could be a factor, together with all the other circumstances, that would support an inference of an agreement on price, and would also tend to support the monopolization charge (4993a–4999a).

This careful, comprehensive and correct charge, together with the full opportunity respondents had to present such evidence on costs and profits as they wished (see *infra*, pp. 48–49), refutes any contention

[22] As the district court noted in its post trial opinion, respondents never submitted meaningful requests to charge on this issue, although repeatedly requested by the trial court to do so (6455a; 281 F. Supp. at 843).

that the instructions on costs and profits were unfair or prejudicial.

The district court's charge on that issue fully and fairly sets forth the significance of these facts and the weight the jury was entitled to give to them. See, *e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 804–806. If, as the court of appeals suggests, the giving of such an instruction is reversible error, the government's ability successfully to prosecute price fixing and monopolization cases in oligopolistic industries will be seriously weakened.

C. THE EVIDENCE OF HIGH PRICES AND PROFITS WAS NOT MISLEADING

Defendants complained that the evidence on profits was incomplete and inflammatory in that expenses other than production costs were not placed before the jury (12594a, 426 F. 2d at 38). This is not correct. In the first place, production costs were not something invented by the government but were used by the defendants themselves in their ordinary business accounting (see fn. 16, *supra*). Further, both the chief executive of Bristol and the chief executive of Upjohn stated that production costs multiplied by a factor of three or four provide a rule of thumb for pricing in the industry (2900a, 3173a–3176a). While there are obviously other costs to be considered, the jury in thinking about prices should be able to use the same rule of thumb a corporate executive used. For both it is a way to make a complex subject understandable.

Second, the evidence of unusually high profits presented to the jury went far beyond the production cost/selling price ratio. For example, Government Exhibit 842 (9269a–9273a) gives Pfizer's own comparison of cost data, and estimated profits at various stages. Using 1957 as an example, these figures show "operating profits" on broad spectrum antibiotics compared to all products including broad spectrum antibiotics to be as follows:

| | |
|---|---|
| All products including broad spectrum antibiotics: | |
| Sales | $59,341,000 |
| Operating Profits | 23,886,000 |
| Broad spectrum antibiotics: | |
| Sales | 36,112,000 |
| Operating Profits | 20,069,000[22] |

The government's evidence relating to costs and profits was taken from records the companies kept in the regular course of business (See page 26, *supra*). The high prices and profits were simply a fact. The jury was not misled.

Moreover, the record shows, as the dissent noted, that "[d]efendants had it within their power to introduce their own evidence on costs" (1261a, 426 F. 2d at 49). The district court did not exclude any evi-

[22] If a further computation is made (by subtracting total sales of broad spectrum antibiotics from total sales, and operating profits for broad spectrum antibiotics from total operating profits) one sees that in products other than antibiotics sales of $27,299,000 produced profits of $3,815,000. Even more comprehensive cost and profit comparisons for Cyanamid, which kept more complete records, were introduced by the government. See GX 852, 9862a–9928a; GX 855, 9933a–9934a; GX 856, 9935a–9936a; GX 862, 10024a–10086a.

dence the respondents offered relating to their total costs.[24]

Although the court refused to permit respondents to introduce such evidence during their cross-examination of government witnesses, this ruling was simply a postponement of its admission, not a permanent exclusion. Indeed, respondents' counsel expressly admitted their understanding that nothing was being permanently excluded on the subject of defendants' costs (1687a–1688a).

The evidence whose admission was thus postponed consisted of special cost studies, which had been prepared for litigation (see 840a, 844a–847a, 1704a–1707a,

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[24] In their briefs on appeal respondents made elaborate economic arguments as to the normalcy of parallel or even static pricing in an oligopoly and the insignificance of production costs. Respondents did not present this material to either the judge or jury below. The arguments, however, are not persuasive in explaining not merely price leadership but ten years of utterly static pricing. That this is an expectable feature of oligopoly without agreement is at best questionable. It was not the prior history of broad spectrum antibiotics. Further as noted in *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F. 2d 953, 965–966 (C.A.D.C.):

> * * * [I]n practice it appears that firms selling in such a market do not always seek a uniform monopoly price and, if sought, do not always attain it. Among the reasons why uniform monopoly prices are not sought or attained is that one seller may believe he can maximize his profits by expanding his total sales rather than taking a maximum profit on each sale. Also, even the mere addition of one seller to an oligopoly market makes the market more complex and less predictable. Therefore, there may be competitive actions and reactions in an oligopoly market. [See, also, *C-O-Two Fire Equipment Co.* v. *United States*, 197 F. 2d 489–493 (C.A. 9), certiorari denied, 344 U.S. 892.]

1847a–1849a; Bristol exhibits for identification, 621, 622, 623, 624, 12420a–12458a). The trial court postponed its admission until it could be introduced through qualified witnesses, and the government could have the opportunity to examine the data underlying the studies in order to prepare for cross-examination (1848a–1849a, 1988a–1990a). The trial court was expressly assured that respondents had available qualified witnesses through whom they could introduce their studies (1707a–1708a, 1989a–1990a). Studies relating to Squibb's total costs (Pfizer X 602–605, 12513a–12527a), the admission of which, like respondents' special cost studies, had been initially postponed (2238a–2241a), were later received in evidence without objection (4426a–4428a).

Respondents, of course, could have introduced their studies as part of their defense, but for their own reasons they elected to submit the case to the jury on the basis of the government's comprehensive evidence. Whatever was "withheld from the jury" on this subject was not by "exclusion," but as a result of respondents' own decision (see 4564a–4565a).

D. THE CHARGES ON THE DENIALS OF WRONGDOING BY THE DEFENDANTS' PRINCIPAL OFFICERS WERE APPROPRIATE AND CORRECT

The defendants' principal officers had denied that in their various meetings they had agreed to limit price competition or to try to achieve monopoly power.[25] Some denials were specific, *e.g.*, that at a particular meeting price was not discussed (2562a); many were

[25] See 2365a–2366a, 2373a–2375a, 2428a–2429a, 2562a–2564a, 2734a–2735a, 2758a–2759a, 2774a–2775a, 2850a–2851a, 3081a–3082a.

general—that there was no agreement or understanding as to price or entry into the market (*e.g.*, 2734a–2735a). The officers also testified as to business reasons for particular actions (*e.g.*, 2549a). The court of appeals, in its first opinion, criticized an isolated part of the trial judge's charge on denials of guilt (12598a, 426 F. 2d at 40). The trial court had charged:

> Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understanding or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such weight as it permits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the conspirators did not believe

> they were violating the law or intend to commit such a violation.
>
> This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you [5000a–5001a].

The court of appeals treated this portion of the charge as if it were the only charge on credibility and as if the trial court had ignored the specific denials and explanations of the defendants' officers (12598a, 426 F. 2d at 40). The trial judge, however, had charged fully on the credibility of witnesses (5003a–5005a). The court had also made numerous references to the business explanations of defendants' action and had charged the jury repeatedly that the actions were entirely lawful if taken individually and the jury was to consider whether they were normal independent business decisions or unlawful conspiratorial activity (*e.g.*, 4956a, 4967a, 4971a, 4989a). The portion of the charge criticized by the court of appeals properly concentrated on the effect of the general denials of wrongdoing:

The charge was correct. Whether an "agreement" illegal under the Sherman Act has been made is a mixed question of fact and law. *United States* v. *Gypsum Co.*, 333 U.S. 364, 396. See also, *United States* v. *General Motors*, 384 U.S. 127, 141, n. 16;

*United States* v. *Parke Davis & Co.*, 362 U.S. 29, 44–45; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194, n. 9. In cases of this type, officials of defendant companies frequently deny that they have entered into any illegal agreements. Such denials may be deliberate untruths or may rest upon the witness' honest but mistaken view of the legality of their acts. The denials are just one factor that the jury must take into account in the light of all the evidence bearing on the issue.[26]

The court of appeals' final criticism was that "[t]o allow the jury to convict without finding that these denials were untrue would free the government from its basic theory of the case and allow it to rely on any understanding that might be inferred from other conduct" (12598a, 426 F. 2d at 40). This criticism is consistent only with the court of appeals' initial erroneous view that the government was required to show a specific express agreement. As the court of appeals' second opinion recognized, "On reconsideration, we believe the Government's point is well taken and we do not rely upon the express agreement contention as a ground for reversal" (12618a, 437 F. 2d at 958). Since the instruction directed the jury to consider the totality of the circumstances, it was correct.

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[26] See *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44: "* * * judicial inquiry is not to stop with a search of the record for purely contractual arrangements * * *. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." See also *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 195.

E. THE INSTRUCTIONS ON THE PATENT PROCEEDING WERE APPROPRIATE AND CORRECT

Among the "means and methods" by which the indictment alleged the conspiracy was effectuated were those relating to the manner in which Pfizer's tetracycline patent was obtained. It alleged that "Cyanamid assisted and cooperated with Pfizer in obtaining for Pfizer a patent on Tetracycline" (Ind., ¶46 (c), 34a) and that "Pfizer and Cyanamid and Bristol [27] withheld pertinent and material information from the Patent Office and otherwise misled the Patent Office prior to the issuance of Pfizer's Tetracycline Patent" (Ind., ¶46 (e), 34a). The facts relating to these contentions were complex. If the jury was to consider the significance of this evidence and to make an intelligent determination as to whether it supported the government's allegations, it had to be given a background against which it could evaluate the contentions of both sides.

To this end, the instructions summarized the parties' basic contentions on the patent aspects of the case; described Patent Office procedure with particular reference to the applications, declaration of interferences and settlements which were an important part of this case; described the duty of patent applicants to disclose to the Patent Office material facts relevant to their applications; outlined the factual dispute between the parties relating to what information the Examiner had requested from the

[27] The allegation as to Bristol was subsequently withdrawn, 4525a–4526a.

applicants; and mentioned some of the evidence in connection with the arguments both sides had made on the question whether Cyanamid and Pfizer, respectively, had deliberately deceived the Patent Office pursuant to or in furtherance of the conspiracy charged (4967a–4890a).

In its first opinion the court of appeals held this approach erroneous because it read the instructions as having "stressed" the "patent situation," which together with the "stress" on unreasonably high profits and profits, improperly diverted the jury from determining what the court then thought was the primary issue—whether express agreements had been made at specific meetings (12599a–12600a, 12602a, 12611a, 426 F.2d at 41, 43, 48).[28] The court of appeals condemned these instructions because "nowhere was the jury told in clear language that the Patent Office proceedings were relevant only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or exclude others" (12599a–12600a, 426 F. 2d at 41).

The court of appeals' proposed instruction would have been incorrect. It improperly assumes that the conspiracy must have been expressly agreed to on those dates. The instructions as given by the district court were more accurate and fully as cautious: The

[28] Unlike the instructions relating to the price and profit aspects of the case, the "patent fraud" part of the instructions was not referred to in the court of appeals' opinion denying rehearing.

instructions on cooperation between Pfizer and Cyanamid before the Patent Office were:

> Now, in connection with the charge that Cyanamid assisted Pfizer to obtain a patent in order to seek unlawful conspiratorial objectives, you will, of course, want to review the evidence you have heard concerning the extent to which the positions of Pfizer and Cyanamid may have indicated cooperation and mutual support, and the extent to which such actions displayed the individual pursuit of their individual interests by these separate companies.
>
> To what extent, if at all, did Cyanamid actually appear to be helping Pfizer to obtain a patent under which Cyanamid would thereafter be required to pay royalties and non-licensed producers of tetracycline might be excluded? To what extent did Cyanamid, pursuing its own goals, oppose and resist Pfizer's application on legitimate and available grounds?
>
> Considering both the evidence of what Cyanamid did and the explanations of its officials for these actions, was this the normal and self-regarding conduct of a competitive company? Or did it reflect the existence of an understanding and joint purpose by Cyanamid and Pfizer to pursue the objective of excluding competition or fixing antibiotic prices?
>
> You should carefully consider all of the testimony and documentary evidence concerning the first and second patent interferences, the Pfizer-Cyanamid settlement of the first interference, and the circumstances surrounding these proceedings, to determine whether this

evidence tends to show the presence of a conspiracy, the absence of a conspiracy, or nothing either way [4970a–4971a].

The instruction with respect to Pfizer and Cyanamid misleading the Patent Office stated:

> Let me summarize this subject by saying that before you may treat the evidence under this heading [whether Pfizer and Cyanamid withheld pertinent and material information from and otherwise misled the Patent Office] as proof of guilt, you must find beyond a reasonable doubt three things:
>
> First, that the representatives of either Pfizer or Cyanamid, or both, knowingly misrepresented or withheld material information from the Examiner.
>
> Second, that but for such deception, the Examiner would not have allowed the Pfizer application on January 11, 1955, or for at least some substantial period thereafter.
>
> Third, that such deception was practiced by either Pfizer or Cyanamid, or both, pursuant to or in furtherance of the alleged conspiracy [4979a–4980a].

Since the issues and evidence having to do with the allegations of Patent Office misconduct were technical and complex, the court had to devote considerable time to explaining them to insure that the jury would enter its deliberation properly focused. The court of appeals erred, we submit, in concluding that this explanation in the instructions, the length of which was due to the complexity of the subject matter, constituted an improper stress on an inflammatory is-

sue. Deception of a patent examiner by major corporations may indeed arouse emotions, but to the extent this is so it is an unavoidable consequence of exposing the course of action that defendants chose and is not attributable to any misinstruction by the trial judge. The instruction given de-emotionalized the issue by explaining the significance of the evidence in relation to the violations charged and calling for preliminary findings before the evidence could be considered as proof of guilt.

Finally, the length of the instructions dealing with the patent aspects of the case came as no surprise to the respondents. Their requested instructions on this subject were themselves lengthy (see 5164a–5167a, 5169a–5172a, 5204a–5216a, 5216a–5222a, 5543a–5549a), and the district court took the somewhat unusual step of giving the parties a part of its proposed charge on this topic well in advance of delivering it to the jury and invited them to comment on it (4681a–4693a). None of the respondents asserted that it was unduly long; they simply suggested minor changes and corrections (7330a–7332a, 7339a–7340a, 7341a–7344a).

Not long before it heard this case, the court of appeals held, in *United States* v. *Birnbaum*, 373 F.2d 250, 257 (C.A. 2), certiorari denied, 389 U.S. 837, that:

> In determining whether a judge's charge has exceeded the bounds of propriety, a multitude of factors must be considered. The length of the charge, for instance, must be judged by the

> complexity of the factual and legal issues involved in the case, and the fashion in which counsel presented them to the jury. The trial judge is best suited to determine how detailed his charge must be in order that the jury derive the maximum benefit. Therefore, an appellate court should not decide that a charge is defective by a mere count of the pages in the record. * * *

Under that standard—the proper one, we submit—the district court's instructions on the patent aspects of this case were proper.

## II. THE RULINGS AND INSTRUCTIONS CONCERNING PARKE, DAVIS WERE CORRECT

Parke, Davis, one of the four firms manufacturing and selling broad-spectrum antibiotic drugs, was neither indicted nor named as a conspirator and the government conceded that "it absolutely was not" a conspirator (4526a–4527a). Certain of Parke, Davis' practices (its prices, package-sizes, dosage forms, and marketing techniques) paralleled those of the defendants who, the government claimed, had acted pursuant to a conspiracy. Others were different. It never handled tetracycline. It never licensed anyone to manufacture or sell its patented antibiotic, Chlromycetin; it never obtained a license for the manufacture or sale of any other broad-spectrum product; it never bought or sold such products in bulk—indeed, it declined Bristol's offer to furnish it bulk tetra-

cycline; and it was not involved in the patent interferences or settlements, the cross-licensing agreements, or the various meetings and negotiations between Pfizer and the other conspirators concerning tetracycline."[29]

One of the defendants' major contentions at the trial was that the fact that a non-conspirator did some of the same things they did showed that their actions did not result from conspiracy.

The court of appeals found reversible error in the rulings and instructions relating to Parke, Davis, because, in its view, the district court:

(1) improperly limited the arguments respondents could make to the jury based on similarities between their conduct and the conduct of Parke, Davis and the fact that Parke, Davis was not claimed to have been acting pursuant to the conspiracy;

(2) failed to refer specifically in its charge to the similarities in conduct between respondents and Parke, Davis, as respondents had requested; and

(3) improperly deprecated the significance of comparisons with Parke, Davis (12602a–12605a, 426 F. 2d at 43–45).

None of these alleged errors remain of substance after an examination of the record of the trial.

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[29] Ct. X 4, pp. 2, 5, 30–156; 6692a, 6695a, 6720a–6846a.

A. DEFENDANTS WERE PERMITTED TO ARGUE FULLY PARALLELS BETWEEN THEIR CONDUCT AND PARKE, DAVIS', SUBJECT TO THE GOVERNMENT'S RIGHT TO ARGUE THE DIFFERENCES; THEY WERE BARRED ONLY FROM ATTRIBUTING EVIDENTIARY SIGNIFICANCE TO THE FACT PARKE, DAVIS WAS NOT INDICTED.

The court of appeals ruled that the district court placed "restriction[s]" on respondents' counsel, in the absence of which they "could have stressed [to the jury] that Parke, Davis quite independently of any conspiracy had paralleled defendants in its pricing and licensing practices both before and after the commencement of the alleged November 1953 conspiracy" (12605a, 426 F. 2d at 44). The record refutes this conclusion.

The district court permitted precisely the argument the court of appeals erroneously believed had been cut off—*i.e.*, an argument based on similarities between respondents' conduct and that of Parke, Davis and the fact that the latter was not claimed to have been a conspirator.

During the trial there was a robing room colloquy on the significance of Parke, Davis' non-indictment. This led the court to ask for submissions on the point. The court noted that an argument based on a third person's non-indictment or presumption of innocence "sounds wrong," but suggested that the Parke, Davis evidence might be used in appraising the government's claim that respondents maintained unreasonably high prices on broad spectrum antibiotics (3517a–3523a).

The non-indictment issue was again raised during the arguments for acquittal at the close of the gov-

ernment's case. The court suggested that both sides might make jury arguments based on the similarities and differences between the alleged conspirators' conduct and that of Parke, Davis (4526a–4531a).

The court finally ruled that it would permit both sides:

> to risk arguments in summation based on comparisons between the defendants and Parke, Davis. I have indicated to you that I think there is a risk in that to which the defendants ought to be peculiarly sensitive.
>
> I must allow the government, if I allow the defendants to do this, to argue the differences at least in rebuttal between Parke, Davis and the alleged conspirators [4646a].

The court also ruled (*id.*) that it would:

> sustain objections to arguments based on the legal notion of the presumption of innocence which I think has no place in that discussion and I think it would be an incorrect legal approach to the subject.

Respondents excepted to the ruling prohibiting references to Parke, Davis' presumption of innocence (4646a–4647a).[30] The district court explained that "the presumption of innocence is what [the defendants] are entitled to and a layering of other presumptions is not useful" (4647a). The court expressly ruled, however, that respondents were free to refer in their arguments on this point to the fact that the government did not claim that Parke, Davis was a

[30] They also excepted to a similar ruling on a slightly altered version of the same proposition—a presumption that business is conducted lawfully (4646a–4647a).

member of the conspiracy.[51] Counsel for Pfizer acknowledged that they were free to argue this (4647a).

In their arguments to the jury, counsel for Cyanamid and for Pfizer both referred to the fact that Parke, Davis was not charged with being a conspirator but had done some of the things that, according to the government, were done by the other defendants pursuant to a conspiracy. Although these references to Parke, Davis were brief, they show that defense counsel did not consider themselves under any prohibition against arguing the point to the jury.

Cyanamid's counsel first discussed the evidence that Parke, Davis, "not claimed to be a conspirator," had reduced its prices to meet those of the defendants and that the defendants in turn had reduced their prices to meet Parke, Davis' reductions (4758a). He also pointed out that a Parke, Davis official, Loynd "who isn't charged in any wrong-doing, specifically denied that there was any agreement with anybody about how he priced his goods, and I suspect if you remember Mr. Loynd you would agree, looking at him, that that would unquestionably be true" (4759a). In discussing the pre-1953 market Cyanamid's counsel reminded the jury that none of the three patent holders "licensed anyone else to make or sell that drug and no one of them sold in bulk to others, and there is no claim at any time in following their respective business policies Cyanamid and Parke,

[51] Mr. Wood [for Pfizer]: "I think we ought to get this one clear. We are free to say that the government does not claim that Parke, Davis is in the conspiracy?

The Court: "Yes. * * *" (4647a).

Davis and Pfizer were conspiring" (4756a–4757a; to the same effect see 4758a–4759a, 4770a). Finally, he pointed out (4770a) that while Cyanamid "did not sell its antibiotic materials in bulk * * * [i]t is true of Parke, Davis also."

Pfizer's counsel referred to Parke, Davis' meeting Pfizer's own price reductions and argued that the reason for this price parallelism was that "It is clear from the acts of Lederle and Parke, Davis and it is not claimed there was any conspiracy between them, that neither of them wanted to be undersold by its competitors in terms of catalog price and Mr. Loynd testified that that was the case" (4811a).

The government in its closing argument mentioned the defendants' references to Parke, Davis. It reminded the jury that it had "heard some reference to Parke, Davis. Parke, Davis did this just like they [respondents] did and Parke, Davis did not do this. Keep in mind Parke, Davis is not named as any conspirator and Parke, Davis did not accept Bristol's invitation and Parke, Davis has not had any licensing arrangement for bulk or any other things. That is enough for Parke, Davis" (4833a).

To be sure, counsel for the defendants might have argued the Parke, Davis point more vigorously. But their failure to do so was not the result of any prohibition of the trial court, which had made it clear that they were free to make the argument, as they briefly did. Rather, their failure to make more of the point may have reflected their counsel's concern that pressing too hard could have led to strong rebuttal

from the government emphasizing the differences between the conduct of Parke, Davis and that of the respondents—as the district court had warned could have happened (*supra*, p. 61). The limited references respondents made in their summations to Parke, Davis thus reflected their own trial strategy rather than any limitation the district court had placed upon them.

The district court's refusal to permit arguments based on the "presumption of innocence" relating to Parke, Davis (12603a, 426 F. 2d at 43) was proper, and, in any event, well within its discretion. All persons are presumed innocent until proved guilty. The fact that one company did some of the things that others were indicted for does not give those acts any special *cachet* of innocence.

Further, had the court allowed defendants to urge that Parke, Davis' non-indictment had some evidentiary significance, the jury might have drawn the impermissible inference that the mere indictment of the defendants carried some implication of their guilt. Both sides had requested instructions on the presumption of innocence attaching to defendants (5122a–5123a, 5226a), and on the proposition that an indictment is entitled to no evidentiary weight and creates no presumptions of any kind (5125a–5126a, 5227a–5228a). The district court ruled that it would give the substance of these requested instructions (4625a, 4657a), and it did so (4943a–4944a). To permit arguments based on the "presumption of innocence" of a non-party or to give an instruction incorporating that

notion, could well have confused the jury by undermining the fundamental principle that an indictment is neutral and that the government must overcome the *defendants'* presumption of innocence.

B. THE DISTRICT COURT PROPERLY REFUSED TO GIVE THE INSTRUCTION ON PARKE, DAVIS REQUESTED BY DEFENDANTS.

The court of appeals ruled that the district court erred in refusing to give the instruction respondents requested on Parke, Davis (12605a, 426 F. 2d at 44–45). The rejected instruction, though a good deal longer than this summary, was to the effect that Parke, Davis had a patent on its broad spectrum antibiotic product, that it granted no licenses and made no bulk sales, that from 1954 through 1961 its product accounted for 23.8 percent of sales in the broad spectrum antibiotics market, that it had substantially the same prices as the defendants and that no one claims the conduct of Parke, Davis was pursuant to a conspiracy (12604a–12605a, 426 F. 2d at 44).

The requested instruction was onesided since it stated the similarities but not the differences between the conduct of respondents and of Parke, Davis. As the district court observed when it declined to give the requested instruction, "I question whether I ought to devote a couple of paragraphs in this way to the similarities between Parke, Davis and the alleged conspirators without then going into the differences * * *" (4711a–4712a). To single out by specific reference in the charge only the similarities between Parke, Davis' conduct and respondents' without mentioning also the differences, would have presented the jury

with an inaccurate and unbalanced picture of the evidence. The district court properly declined to explain to the jury the similarities between the respondents' and Parke, Davis' conduct, and left it to both sides to make whatever arguments they wished.

Moreover, respondents' requested instruction contained the implied notion that any conduct of theirs that was similar to Parke, Davis' was not to be considered as proof of the conspiracy charged. An instruction which conveyed that idea would have been incorrect. While parallel conduct is not itself proof of conspiracy, it may nevertheless form part of the circumstantial evidence which proves an understanding that certain conduct will be followed in the future. To cite but one illustration, uniformity of price in this case, including Parke, Davis' prices, did not by itself prove conspiracy. But price uniformity considered with other facts, such as, for example, the sale to Pfizer by Cyanamid of a very large amount of bulk tetracycline with which to make tetracycline products at a price geared to the then existing market price, supports an inference that the parties to the sale had an understanding as to future prices. (See n. pp. 12–13, *supra*). For the court to suggest that any conduct by defendants which was paralleled by Parke, Davis could not be considered as proof of the conspiracy, would erroneously invite the jury to compartmentalize the evidence instead of viewing each element in the context of the totality of the proof. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699.

The trial court's refusal to summarize in its instructions the evidence of similarities and differences between Parke, Davis and respondents, leaving that task to the parties to perform in their summations, was a reasonable exercise of its discretion. A federal trial judge has "broad discretion in deterimining what evidence he will comment upon * * *," *United States* v. *Light,* 394 F. 2d 908, 911 (C.A. 2). "While a federal judge is privileged to 'sum up the facts to the jury' if these are clearly left subject to its determination, *Starr* v. *United States* [153 U.S. 614, 624–625], he is not required to do so. Whether or not he should, rests 'in his discretion,' *ibid.*, it is within his province, whenever he thinks it necessary.' *Quercia* v. *United States* [289 U.S. 466, 469]." *United States* v. *Kahaner,* 317 F. 2d 459, 479, footnote 12 (C.A. 2) certiorari denied, 375 U.S. 836.

C. THE CHARGE AS TO THE SIGNIFICANCE OF THE PARKE, DAVIS EVIDENCE WAS FAIR AND ACCURATE.

The district court's instructions first referred to Parke, Davis in connection with the conspiracy to monopolize and monopolization counts:

> A conspiracy to monopolize, as charged in Count 2, or the substantive offense of a monopoly actually achieved, as charged in Count 3, must relate to some identified market in a specified commodity or commodities reasonably interchangeable in their uses by purchasers or consumers of such goods. Here, you will recall the market alleged is claimed to be comprised of four broad-spectrum antibiotics: Aureomycin, Terramycin, tetracycline, and Chloromy-

> cetin. In appraising both the conspiracy charge in Count 2 and the substantive charge in Count 3, you will deal, among other things, with the evidence as to market shares held by the defendants and others to determine whether the alleged power reached to an appreciable part of the commerce in question. You will consider in this connection the relative positions of the alleged conspirators in relation to the changing position of Parke, Davis, which, as you know, is not alleged to be a conspirator and which controlled a large and, until 1961, an increasing share of the market in question with its patented product, Chloromycetin [4959a].

Then, near the end of the charge, the district court delivered the following two-paragraph instruction on Parke, Davis, which the court of appeals held constituted prejudicial error:

> I come to one final observation I want to make in these instructions about something included in the evidence you have heard. There has been evidence about Parke, Davis and about Chloromycetin, the broad spectrum antibiotic which is alleged to have comprised part of the market involved in this case. You have learned that Parke, Davis was a substantial factor in that market, and I have mentioned the possible significance of that situation as it affects the question of monopoly and may affect other issues in this case. We have heard of various respects in which the practices of Parke, Davis as to dosages and prices and marketing techniques paralleled those of the defendants and of Squibb and Upjohn. We have also heard some

evidence and argument concerning the differences between Parke, Davis and the defendants on trial here. You are aware, as counsel for both sides have stated, that Parke, Davis is not alleged to have been a member of the conspiracy charged by the government.

Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis * * * is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom [5001a–5002a].

Respondents excepted to this portion of the charge (5028a). The court of appeals ruled that the instruction was prejudicial because (1) it "could well have had the effect of stressing the failure to indict, thus carrying the connotation that Parke, Davis might have been guilty but was not indicted for undisclosed reasons," and (2) the concluding sentence of the Parke, Davis portion of the instruction (which told the jury that "the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them * * *" (5002a) "lessened, or might have foreclosed the giving of, any weight which the jury might attribute to the evidence

of Parke, Davis' conduct" (12604a, 426 F. 2d at 44). We submit that both criticisms are ill founded.

(a) What the court instructed was that the jury should *not* speculate as to why Parke, Davis was not indicted. If the jury had so speculated this would hardly have been reversible error. But here it is clear that the jury knew Parke, Davis was not alleged to be a wrongdoer.

Although respondents objected to the Parke, Davis instruction both before and after the charge (4646a–4647a, 5028a), they never suggested to the district judge that the jury might construe the language as a subtle suggestion that Parke, Davis might be guilty of conspiracy to fix prices or monopolize. If that danger was not evident to counsel for respondents, it is not likely that the jury would so construe the language. In fact, the government had just said in its closing argument (4833a):

> Keep in mind, Parke, Davis is not named as any conspirator and Parke, Davis did not accept Bristol's invitation and Parke, Davis has not had any licensing arrangement for bulk or any other things.

The possibility that the jury might have speculated that Parke, Davis might have been guilty but was not indicted for undisclosed reasons was so remote in light of the constant reminders in the trial that Parke, Davis was not considered a conspirator that it should have been disregarded by the court of appeals. It fell far short of the kind of prejudicial error sufficient to invoke the application of the rule permitting appellate courts to notice "errors or defects affecting substantial rights" that were not specifically brought to the trial court's attention. F.R.Crim.P. 52(b).



(b) The court of appeals' second point—that the concluding sentence in the Parke, Davis part of the instructions might have caused the jury to give less weight than it otherwise would have to the Parke, Davis evidence—is untenable when that language is considered in the context of the instructions as a whole and of the entire trial.

Both sides referred to Parke, Davis in their openings, evidence and summations to the extent they thought suitable. In its instructions (5001a–5002a), the trial court reminded the jury of arguments concerning similarities and differences between respondents and Parke, Davis, and pointed out that Parke, Davis is not alleged to have been a member of the conspiracy charged by the government, and that "insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts * * * have been placed before you and are part of the total evidence you may consider in reaching your [verdict]." After then stating that Parke, Davis' non-indictment was irrelevant, the trial court concluded its discussion of Parke, Davis by telling the jury that "the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them * * *."

When viewed as an integral part of the whole instruction, it is simply speculation to suppose that the language suggested to the jury that it ignore the facts presented as to the similarity and differences



1955, "because while Bristol is charged with entering the conspiracy in December, 1955, this provides a background * * *, motive, the context, the ground from which Bristol's activities sprung" (4830a). Then, after again mentioning that "1955 is the year Bristol is alleged to have entered the conspiracy" (4836a), government counsel stated (4866a–4867a):

> * * * We have said that Bristol came into the conspiracy in December 1955, and we will reach that meeting with Schwartz and McKeen, but until that point there is no question * * * they fought as hard as they could, they used every means in their possession, to try to get into this business.
>
> * * * [U]ntil the time * * * Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal, but that's not to say that because they came in late they didn't come in at all * * *.
>
> Never mind what happened before December 1955 as far as Bristol is concerned and this conspiracy is concerned. Keep your eye on what happened after December 1955.

It was against this background that the district court gave its instructions.

B. THE DISTRICT COURT'S INSTRUCTIONS EMPHASIZED THAT BRISTOL COULD NOT BE CONVICTED FOR CONDUCT PRIOR TO DECEMBER 1955.

The trial court instructed the jury that if it found Bristol or the other two defendants guilty, it had to find them guilty of the conspiracy charged in the indictment and none other.



> * * * if any of these defendants is to be found guilty, this finding can rest only upon proof of the conspiracy charged in the indictment. You could not, for example, convict any of the defendants for engaging in other wrongful conduct or for joining in other or different conspiracies. I hasten to add, this is not to imply that there were, or that anyone suggests, such other or different things, but I merely emphasize here the fundamental principle that unless a defendant is found guilty upon the charge as he met and defended it, he or it cannot be found guilty at all [4953a].

Following this admonition, the trial court stated on four separate occasions during the instructions that the government claimed Bristol joined the conspiracy in December 1955 (4963a, 4971a–4972a, 4982a, 4999a).

These admonitions and references by the presiding judge in the context of trial and argument alleging only that Bristol joined the conspiracy in December of 1955 refute any claim that the jury might have been led to find Bristol guilty for conspiring before that date.

C. TO INSTRUCT THE JURY THAT BRISTOL'S PRE-DECEMBER 1955 CONDUCT COULD NOT BE CONSIDERED AS PROOF OF BRISTOL'S BEING IN "ANY" CONSPIRACY WOULD BE A CLEAR DEPARTURE FROM ESTABLISHED PRINCIPLES.

Since evidence of pre-conspiracy conduct is relevant to motive, intent and method of operation, and may also be a basis for showing illegal design (*United States* v. *Houlihan*, 332 F. 2d 8 (C.A. 2), certiorari denied, 379 U.S. 828), both sides had the right to em-

of the activities of the defendants and co-conspirators on the one hand, and Parke, Davis on the other.

In any event, the jury's requests for evidence relating to Parke, Davis during its deliberations and the manner in which the evidence was delivered to it should have laid to rest any doubts as to the possibility that the instruction was construed as forbidding or preventing consideration of the Parke, Davis evidence.[22] The jury's requests themselves indicate that

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[22] On the second day of its deliberations the jury asked for "charts or exhibits showing Parke, Davis share of broad spectrum antibiotic market during period involved as referred to in Judge's charge page 6281 [5001a]" (5071a). After discussion among the court and counsel, the jury was given three exhibits: GX 875 (10244a) showing each of the six companies' total sales of tetracycline and broad spectrum antibiotics for the period 1954 through 1961; GX 877 (10246a) showing each of the six companies' broad spectrum antibiotic sales and market share percentages for the years 1954 through 1961; and GX 909 (10287a) showing the broad spectrum antibiotic sales and market shares of Cyanamid, Pfizer and Parke, Davis for the years 1952 and 1953.

Later that day the jury asked for "the evidence referred to in Judge's charge on page 6281 (line 22) [5001a] concerning Parke, Davis dosages, prices and market technique" (5071a). Again after discussion among the court and counsel the relevant evidence was assembled and given to the jury. First, the district court read the jury paragraphs 6(b), 17, 18(e), 23 and 9 from Stipulation of Facts No. 2 (Ct. X 4, pp. 2, 5, 6, 3, 6692a, 6695a, 6696a, 6693a) dealing with the issuance of the patent covering Chloromycetin to Parke, Davis, its introduction of that product on the market, and the facts that Parke, Davis did not grant any licenses under its Chloromycetin patent and made no bulk sales of Chloromycetin. The jury was then given seven copies of Exhibit B of that stipulation which sets forth the catalogue prices to each trade class for

the jury did not so construe the instructions. But perhaps more important, the trial court's participation in giving the jury the evidence it asked for could only have indicated to it that the court did not believe consideration of that evidence impermissible or misguided.

We submit that the trial court allowed full presentation of evidence and full argument on the differences and similarities of Parke, Davis' conduct, and correctly rejected instructions that would have distorted the significance of Parke, Davis' nonindictment, The defendants' displeasure with these rulings should not be equated with error by the trial judge.

### III. THE INSTRUCTIONS CONCERNING THE PFIZER-BRISTOL ARRANGEMENTS FOR THE GRANT OF NON-MANUFACTURING LICENSES TO SQUIBB AND UPJOHN WERE CORRECT.

The court of appeals held that the Squibb-Upjohn instruction conveyed an "incorrect * * * interpretation of the agreements" because from it the jury

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the broad spectrum antibiotics sold by each of the six companies (5071a–5073a).

After retiring briefly the jury was called back so that the rest of the evidence it requested pertaining to Parke, Davis could be given to it. Portions of the testimony of Loynd, Parke, Davis' president, Dr. Malcolm, chief executive officer of Cyanamid, and Jones, the government's statistical expert, were read to the jury. The jury also received copies of GX 928 (10319a–10321a), a tabulation of catalogue price changes of tetracycline, Aureomycin and Terramycin between October 2, 1951 and July 31, 1960, and GX 929 (10322a–10323a), a similar tabulation for Parke, Davis' Chloromycetin. Portions of Jones' testimony, the witness through whom these exhibits were introduced, were read to the jury (5073a–5074a).

"might well have concluded that the December 1955 Bristol-Pfizer agreement," in which Pfizer licensed Bristol to manufacture and sell tetracycline to the trade and to sell in bulk to Squibb and Upjohn itself "violated the antitrust laws and that Bristol and Pfizer had collaborated in imposing restrictions which otherwise did not exist" (12607a–12608a, 426 F. 2d at 45–46). It also concluded that the instruction improperly referred to the licenses to Squibb and Upjohn as restrictive. Finally, it held that the trial court should have charged specifically that the November 1955 agreements between Bristol and its bulk customers Squibb and Upjohn giving Bristol the exclusive right to settle the patent infringement "could not be considered a part of any conspiracy," and that the issuance of the licenses by Pfizer at Bristol's request "'does not amount to an agreement or understanding by Pfizer with Bristol under which Pfizer promised not to grant manufacturing rights to Upjohn'" (12607a, 426 F. 2d at 45).

A. THE CHARGE WAS EXPLICIT THAT NONE OF THE LICENSING AGREEMENTS WAS IN ITSELF A VIOLATION OF THE SHERMAN ACT.

The following language in the district court's charge, we submit, more than adequately explained to the jury that the patents and licenses and settlements of lawsuits involved in this case were not in themselves violations of the Sherman Act.

> * * * I remind you of my earlier instructions that a patent holder, in the absence of an unlawful agreement or conpiracy, is free to license or refuse to license whomever he wishes. You

should also understand that the mere agreement to cross-license between companies which hold blocking or conflicting patents is not a violation of the antitrust laws. Indeed, such interchange of patent rights in settlement of controversy is often necessary in order to permit technical progress.

In addition, I think it has already been made clear to you that the holder of a patent may license others to make, use or sell the discovery, with such restrictions as may be within the limits of the patent grant. Thus, in the absence of conspiracy, the owner of a patent on a product may license another company to manufacture and use that product solely in the manufacture of some other product. The kind of license you understand that was involved in the Pfizer use of Aureomycin to make tetracycline.

The holder of patent rights has, in other words, a form of lawful monopoly and freedom to exclude others from sharing it. But the patent laws as I have told you, do not authorize him to agree with his licensees that he will exclude or restrict others by refusal or limiting grants under his patent to such other or third parties. Agreements of this kind come within the prohibitions of the antitrust laws rather than the privileges granted by the patent laws.

Now the government does not claim that any of the license agreements involved in this case or indeed any of the written agreements in this case is in itself unlawful or in combination with any of the others, without reference to other facts. Accordingly, you may not infer an antitrust violation merely from the existence of such agreements or from any of the terms con-

tained within them. Your task here is to consider the grants of licenses together with the refusals or absence of such grants to others, in the light of all the testimony and documentary evidence concerning licenses and related problems, in order to determine whether this evidence tends to show the presence of a conspiracy, the absence of a conspiracy, or nothing either way [4965a–4966a].

B. THE DISTRICT COURT'S REFERENCE TO THE SQUIBB AND UPJOHN LICENSES AS RESTRICTED WAS PROPER IN THE CONTEXT OF THE TRIAL.

In describing the agreements among Bristol, Squibb, Upjohn and Pfizer the trial court referred to the licenses to Squibb and Upjohn as "limited" or "restricted." The court of appeals considered this as technically incorrect and misleading (12606a–12608a, 462 F. 2d at 46–47). We submit that the charge, once again, was fair and correct and phrased in terms that were appropriate for the jury to enable it to understand the issue.

What the trial court charged was:

> Now, similar considerations to those I have been stating and repeating apply to the next of the means and methods alleged in the indictment. This charge is as follows:
>
> "Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of tetracycline products."
>
> I have mentioned many times that Pfizer, as part of its rights under its tetracycline patent,

could lawfully issue licenses as it saw fit so long as these licenses and their limitations were given in the exercise of independent business judgment. It was not privileged, however, to agree with a licensee such as Bristol that it would deny or restrict licenses to other competitors such as Squibb and Upjohn.

Accordingly, the vital part of this allegation on the government's theory of the case is the contention that this restriction forbidding manufacture by Squibb and Upjohn was imposed at Bristol's request and as part of an understanding among the parties that Squibb, Upjohn and other potential competitors would be excluded from the grant of tetracycline manufacturing rights.

There is nothing wrongful in itself in the fact that the licenses issued to Squibb and Upjohn were requested by Bristol as part of Bristol's privileges and obligations under its arrangements with Squibb and Upjohn for the settlement of the litigation. The critical inquiry on this score is whether the limitation on Squibb and Upjohn, which barred them from manufacturing, was the particular objective of Bristol and was an agreed objective between Bristol and Pfizer in the issuance of that license [4988a–4989a].

The language of any charge must be tailored to the evidence and terminology of the particular case. The Squibb-Upjohn licenses had been described throughout the trial as "limited" or "restricted" in order to denote the fact that they did not authorize Squibb or Upjohn to manufacture tetracycline or sell it in bulk.

In November of 1955, it will be recalled, Squibb and Upjohn agreed with Bristol not to settle or negotiate directly with Pfizer, and Bristol assumed entire control of the prosecution and defense of the Pfizer litigation. Bristol promised to obtain for Squibb and Upjohn tetracycline licenses "which may, however, *be limited* to your [Squibb's and Upjohn's] right to purchase, use and sell tetracycline to the drug trade * * *" (GX 83, p. 7, 8645a; GX 108, p. 6, 8703a, emphasis added). This was the first reference to a "limited" license for Squibb and Upjohn.

During the trial Schwartz, Bristol's chief executive officer, described the Squibb-Upjohn licenses he arranged as "restricted." Responding to the question whether Upjohn's license permitted it to resell bulk tetracycline it might purchase from "anyone" as bulk rather than in product form (*i.e.*, to the drug trade), Schwartz replied: "No it was *restricted* to the drug trade" (2938a, emphasis added).

In argument before the jury Bristol's own counsel explained the licenses as follows:

> Bristol obtained for Squibb and Upjohn licenses which met the conditions of that agreement you just read—that is, they were licenses which permitted Squibb and Upjohn to purchase, compound, use and sell tetracycline to the drug trade. *Keep in mind you will hear that referred to as a limited license or a restricted license. That term is used in the sense that the license was not as broad as it might have been,* but the license did not limit Squibb and Upjohn with respect to tetracycline bought from Bristol [4740a–4741a, emphasis added].

In referring to the licenses as limited or restricted in the context of this trial and especially in the context of a charge making clear that the licenses were not themselves illegal, the court was properly putting the matter to the jury. To treat this as prejudicial error would improperly limit the trial judge's discretion to explain a case to the jury in non-technical terms it can understand. A reviewing court should not reverse a conviction upon such a hypertechnical reading of the charge.

C. THE DISTRICT JUDGE PROPERLY REFUSED TO CHARGE THAT THE NOVEMBER 1955 AGREEMENTS WERE NOT PART OF ANY CONSPIRACY AND THAT THE ISSUANCE OF THE SQUIBB-UPJOHN LICENSES AT BRISTOL'S REQUEST DID NOT AMOUNT TO AN AGREEMENT TO LIMIT MANUFACTURING RIGHTS.

It was appropriate for the jury to consider the November 1955 agreements, the issuing of the licenses and all the surrounding circumstances in determining whether Bristol, its two bulk customers and Pfizer had a tacit understanding that the manufacture and sale of tetracycline would be confined to the defendants and co-conspirators, as the indictment alleged. The November 1955 agreements, though not illegal on their face, were part of the totality of circumstances bearing on the conspiracy alleged. *United States* v. *General Motors,* 384 U.S. 127, 142, 143; *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809–810; and see *United States* v. *Singer Manufacturing Co.,* 374 U.S. 174, 195. The instructions were specific that the agreements themselves were not illegal: "[the] all-requirements contracts were not un-

lawful when viewed by themselves. They could become unlawful only if they reflected, or tended to effectuate, some agreement or understanding among the companies involved by which they undertook to confine the bulk sales business to Bristol or to exclude other potential competitors and purchasers of bulk from the tetracycline market" (4987a–4988.). See point IV C, below, pp. 83–87.

## IV. THE INSTRUCTIONS DID NOT PERMIT THE JURY TO CONVICT BRISTOL FOR ACTS PRIOR TO THE DATE IT WAS ALLEGED TO HAVE ENTERED THE CONSPIRACY.

The court of appeals ruled that the trial court's instructions were prejudicially erroneous because the combined effect of (1) the failure to instruct that Bristol's conduct prior to December 14–15, 1955, could not be considered as proof that Bristol was in any conspiracy and (2) the language in the instructions that the precise dates of the conspiracy need not be proved in order to establish the charges, "could well have caused the jury to believe that Bristol was involved in a conspiracy long before December 14–15, 1955" (12609a–12610a, 426 F. 2d at 47). This ruling does not stand up in the context of the trial.

### A. FROM THE OPENING OF THE TRIAL TO ITS CONCLUSION THE COURT AND COUNSEL FOR BOTH SIDES CONTINUALLY BROUGHT HOME TO THE JURY THAT THE GOVERNMENT CLAIMED BRISTOL JOINED THE CONSPIRACY IN DECEMBER 1955 AND NOT BEFORE.

In its preliminary instructions the court advised the jury that while the indictment charged that the conspiracy began in November 1953 and that Pfizer and Cyanamid were in it from its inception, "it is alleged

that the defendant Bristol and two other companies, Squibb and Upjohn, entered the conspiracy later * * * approximately December of 1955 or approximately two years after the alleged inception" (1469a).

The date of Bristol's alleged entry into the conspiracy was mentioned several times during opening statements to the jury by the government (1482a, 1492a) and by Bristol (1550a–1551a, 1563a, 1568a). Throughout the trial, counsel for Bristol repeatedly reminded witnesses, and thereby the jury also, of the fact that Bristol was claimed to have joined the conspiracy in December 1955 (1818a, 1836a, 1841a, 1844a, 1849a–1850a, 2375a, 3043a, 3069a, 3081a–3082a, 4219a, and see 2838a). Indeed, during the cross-examination of Schwartz, Bristol's chief executive officer, counsel for Bristol "put up on the easel a little hand-drawn calendar for the years 1953 through 1957" on which he placed marks corresponding to the dates of certain events Schwartz testified about in order to impress upon the jury that particular events occurred prior to December 1955 when Bristol allegedly joined the conspiracy (3001a, 3010a, 3016a, 3029a–3030a, 3039a). Thus, the jury was constantly kept aware during the trial of the government's claim that Bristol joined the conspiracy in December 1955 and not before.[23]

Government counsel, in his summation, asked the jury to consider Bristol's conduct prior to December

[23] Another instance of such reminders was the government's statement, made at Bristol's request, on the introduction of documents relating to proceedings before the patent office, that with three exceptions they all "relate to matters before December 1955" (2273a–2276a, 2252a–2254a, 2263a).

phasize that conduct in presenting evidence and in argument. Indeed, Bristol never requested that the jury be told, as the court of appeals would require, that it could not consider Bristol's pre-December 1955 conduct "as proof of Bristol's being in any conspiracy" (12610a; 426 F. 2d at 47). Such an instruction would have been inconsistent with Bristol's argument in summation that the jury should consider Bristol's total conduct, both before and after it was charged with joining the conspiracy, in deciding whether the offenses charged had been established (4744a).

The court of appeals further held that the instructions were prejudicially erroneous because they failed to explain the significance of the fact that Bristol's pre-conspiracy conduct continued to be substantially the same after the date it allegedly entered the conspiracy.[34]

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[34] The court of appeals' initial opinion stated (12610a; 426 F. 2d at 47), referring to Bristol's conduct prior to December, 1955:

> A comprehensive charge as to these prior events became all the more important because the government, in effect, had put its stamp of legality on identity of price and restricted bulk sales. It was thus incumbent on the government to prove beyond a reasonable doubt by some reverse alchemistic process that acts which had been legal had by some action taken at the December 14–15 meetings been changed merely by continuance into acts thereafter illegal.
>
> * * * [F]ailure to differentiate between the legal and the illegal was prejudicial error.

In its subsequent opinion denying rehearing the court, without actually ruling on the point, "incline[d]" to the view that the evidence was insufficient to warrant submission to the jury of the issue whether Bristol joined a conspiracy to exclude (12619a).

But the inference Bristol sought to have the jury draw—that it did not conspire because it did not change its marketing practices after the date on which the prosecution charged it with conspiring—was not the only permissible inference that could be drawn from Bristol's pre-conspiracy conduct. It was equally open to the jury to draw the inference that the McKeen-Schwartz meetings of December 14–15, 1955, resulted in a tacit understanding that Bristol's pre-meeting prices and practices would continue unchanged thereafter. That is, the jury could find that each party to the Bristol-Pfizer agreement understood that the settlement agreement would assure that there would be no change in existing marketing relationships; that after the agreement Bristol, Pfizer and Cyanamid would be the only manufacturers of tetracycline; that Bristol would be the only seller of bulk tetracycline; that it would continue to supply only Squibb and Upjohn with bulk tetracycline and that the prices of the broad spectrum antibiotic products sold by the five co-conspirators would remain unchanged. The "reverse alchemistic process" (12610a, 420 F. 2d at 47), to use the court of appeals' words, by which Bristol's conduct became illegal after December 14–15, 1955, was that its subsequent conduct was not the result of independent business judgment, as its previous conduct had been, but was done pursuant to or in effectuation of the tacit understanding the jury was entitled to find existed when Bristol and Pfizer settled their differences on December 14–15, 1955.

The trial court's instructions made this perfectly clear. The instructions stressed that a "basic and essential element" of the crimes alleged was the existence of a conspiracy, "a mutual agreement or understanding that [two or more persons] will act together for an unlawful purpose" (4950a-4951a). While the "central requirement of an 'agreement'" could be shown by the course of conduct pursued by the parties, the instructions said that "it is the government's burden to show acquiescence and participation [in the illegal scheme] as a matter of conscious choice beyond a reasonable doubt" (4952a). Uniform or mutually beneficial conduct would not be sufficient to establish a conspiracy, the instructions continued (*ibid.*), because

> If such actions were taken independently as a matter of individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy, even though the separate actions were substantially concurrent and tended toward the accomplishment of similar objectives separately pursued by the individual companies.

The significance of any party's conduct changing or remaining the same after the meetings at which the government alleged the conspiracy was initiated or joined was properly left to the jury's determination. After reminding the jury that the "government places the inception of the alleged conspiracy between Pfizer and Cyanamid at the meetings and negotiations of November 1953," and that "the alleged entry of Bris-

tol into the conspiracy, along with Squibb and Upjohn, is dated from the time of the meetings between Schwartz and McKeen and others on December 14 and 15, 1955" (4999a), the instructions turned to the subject of meetings. They cautioned the jury that while proof of "face-to-face meetings" was not required to prove a conspiracy, and while meetings may provide "an opportunity to make either lawful or unlawful agreements," nevertheless "evidence of such meetings could not in itself establish the existence of any unlawful conspiracy" (5000a). "In weighing the significance and meaning of the meetings in this case," the jury was directed to consider various factors, including comparisons between conduct before and after the meetings (*ibid.*):

> [Y]ou will consider the extent to which you have heard legitimate business purposes for [the meetings], the events that came before, and the events that came after, the extent to which the conduct of any of the companies involved remained the same or changed in the times preceding and following such meetings, the public or private statements the parties may have made touching the subject matter of their meetings—and, as usual, and still important, all the surrounding circumstances.

Thus, the instructions correctly set forth the legal principles that were to control the jury's consideration of the evidence placed before it, but properly left the jury free to draw from the evidence the inferences that it thought most appropriate.

## CONCLUSION

This case is not concerned with a minor or technical breach of the law. It concerns a major exercise of concerted power detrimental to the public interest by a group of firms in an industry whose proper functioning is vital to the nation. It concerns a striking example of static and uncompetitive pricing to the great profit of respondents and corresponding expense of the public. Though the techniques may be more subtle than in 1890, the result is what the Sherman Act was intended to guard against.

The case does not concern temporary, or accidental, parallel pricing, or pricing dictated by the cost of the product or expectable in the particular market. The defendants rigidly held their prices although there had previously been competition in the same market, although important new products were being marketed as to which price competition could be expected, although costs left full room for maneuvering and despite fluctuation in market shares to the detriment of efficient producers and the benefit of higher cost producers. That the pricing would continue so static so long under such circumstances is strong evidence of an agreement or understanding between the defendants that they would not compete with one another. *Interstate Circuit* v. *United States*, 306 U.S. 208.

The defendants cooperated with each other in obtaining a patent monopoly, and two of the defendants made misrepresentations to the patent examiner to ob-

tain a patent on a drug that might well have been in the public domain without the misrepresentation. The misuse of the patent system in an attempt to monopolize was flagrant. See *Charles Pfizer & Co.* v. *Federal Trade Commission,* 401 F. 2d 574 (C.A. 6).

The real question in this case is whether in a large criminal antitrust trial, the record shall be combed after the event and the judgment reversed for whatever errors can be found. It is almost inevitable that an appellate court will find better ways to handle situations in retrospect and that some genuine errors will find their way into such a large and complicated record.

The case against respondents was a strong one. The evidence in this case fully justified the conclusion that respondents had an agreement, as that term is used in Sherman Act cases, that they would not compete as to price in the broad spectrum antibiotic market, nor allow others to enter the market. Their actions spoke louder than any words. The jury, after a full trial, with extensive evidence, and issues fully presented, so held. Its decision should be sustained.

A tacit agreement is, necessarily, something that is capable of proof only by circumstantial evidence. Agreements which run afoul of the antitrust laws rarely will be memorialized in written instruments. And where circumstances permit, it may even be unnecessary for parties to particular business transactions to discuss among themselves the elements of a tacit understanding which might form the basis underlying those transactions.[2]

[2] *E. g., American Tobacco Co.* v. *United States,* 328 U.S. 781.

In terms of the kinds of proof which can reasonably be expected to be available to the prosecution in cases of this nature, the evidence of guilt in this case is substantial. If the court of appeals' reversal in this case is permitted to stand on the theory that because the case was "close" slight errors in the trial might have had a decisive impact on the jury, then given the nature and magnitude of the errors the court of appeals thought sufficient to warrant reversal here, the prosecution of major Sherman Act violations will be seriously impaired, as will the deterrent effect that the threat of criminal prosecution was designed to have on potential violators. Antitrust cases are inherently long and complex. Astute defense counsel will always be able to find putative errors or matters that could have been handled another way. The enforcement of laws designed to preserve free competition and free entrance into markets and honest business dealings deserves more hospitable treatment.

There was a time when "courts of review 'tower[ed] above the trials of criminal cases as impregnable citadels of technicality.' So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been * * * obtained." *Kotteakos* v. *United States*, 328 U.S. 750, 759. Rule 52(a) of the Federal Rules of Criminal Procedure restates 28 U.S.C. 2111, which was designed to prevent this: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

This is not a case involving a violation of basic constitutional rights which might prevent a finding of harmless error. Compare *Chapman* v. *California*, 386 U.S. 18, 23. Nor is it one in which a person's life is at stake and the slightest error might be considered harmful. "The character of the proceeding and what is at stake upon its outcome are material factors in deciding whether an error requires reversal." 3 Wright, *Federal Practice and Procedure, Criminal*, 368; *Kotteakos* v. *United States*, 328 U.S. 750, 762.

"A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619." This is especially true where the case is long and complex, the defendants are fully and effectively represented and the atmosphere of the trial orderly and fair. A review of the entire record in this case reveals that respondents were fairly convicted after a trial in which they were vigorously and well represented by, as the district court put it (281 F. Supp. at 841), "[d]istinguished, astute and numerous * * * counsel." The instructions taken as a whole and as part of the lengthy and complex trial which they culminated fully and fairly submitted to the jury the issue whether respondents were guilty of the crimes alleged. As the Second Circuit observed in *United States* v. *Antonelli Fireworks Co.*, also a lengthy corporate conspiracy case (155 F. 2d 631, 641–642, certiorari denied, 329 U.S. 742):

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" "[J]ustice, though due to the accused, is due to the accuser also." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122.

> In the review of a criminal conviction after a long and bitterly fought trial, there is considerable incentive for reviewing judges to order reversal. It is comparatively easy to single out particular instances, which, apart from their setting in the total trial, may afford a dramatic basis for appeal to the American spirit of fair play and cherished love of personal liberty. Such an opinion writes itself, chances of reversal and reinstatement of the verdict are remote, and academic acclaim is assured. But there is a demand for what Wigmore (Evidence, 3d Ed. 1940, § 21) calls "the solid claims of law and order"; and a failure to visit with the moderate punishment here involved serious defrauding of the government in its war effort is unjust to other honest manufacturers and unfair to the endeavors of all others engaged in a common patriotic enterprise. Even an order for a new trial, and the direction to begin the work of prosecution anew, is deadening to the morale of those who have already spent years in developing a case justifying a jury verdict. Of course, we must be acutely sensitive to errors affecting human rights and freedom; but there is an equal demand that the law should have its way when a long and fair trial has proceeded to its natural conclusion. * * *

This case should not be retried. It was tried fairly. There is no reason to believe that a new trial would be any closer to perfect. A remand of such a case is an unnecessary additional expense to the government and the defendants and an invitation to other companies to risk violations of antitrust laws. Defendants

had their full day in court. A jury found them guilty. This finding, after a full, hard fought and fair trial should not be set aside.

Accordingly, the judgment of the court of appeals should be reversed and the case should be remanded to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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